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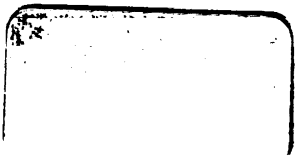

CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS

OF THE

UNITED STATES

FOR THE

EIGHTH JUDICIAL CIRCUIT.

REPORTED BY
GEO. W. M'CRARY,
THE CIRCUIT JUDGE.

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OF THE

CIRCUIT COURTS OF THE UNITED STATES

FOR THE

EIGHTH JUDICIAL CIRCUIT.

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HON. GEORGE W. McCRARY, Circuit Judge.

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REPORTS OF CASES ARGUED AND DETERMINED

IN THE

Circuit Courts of the United States

FOR THE

EIGHTH JUDICIAL CIRCUIT.

BANK OF MONTREAL *v.* THAYER.

(District of Iowa. May, 1881.)

1. FRAUD — HOW ALLEGED — INTENT. — An allegation that the defendant wrongfully, falsely and fraudulently certified and represented certain material facts to be true, whereas none of them were true, is a sufficient allegation of fraud, as they clearly mean that such representations were made with fraudulent intent.
2. RECEIVER'S CERTIFICATE OF INDEBTEDNESS PAYABLE TO BEARER — RIGHTS OF INNOCENT PURCHASER — FRAUDULENT REPRESENTATIONS. Where a receiver of a railroad issued a certificate falsely and fraudulently stating that there was due the Joliet Iron and Steel Company, or bearer, $5,000 for indebtedness incurred by him, and falsely representing that the same was issued by order of court, and constituted a first lien on the railroad, etc., being for iron rails for constructing said road: *Held*, that such representations are to be considered as addressed to, and to be acted upon by any purchaser of the certificate in the market before maturity, and that it was not necessary to allege an intent to defraud the plaintiff, who was such a purchaser; nor was it necessary to allege or prove that there was a fraud practiced upon the Joliet Iron and Steel Company, the payee. In such a case the law presumes the intent to defraud whoever might purchase the certificates in the market, and upon the faith of the representations expressed upon their face.
3. SAME. — Plaintiff must show that he acted upon said representations, and had a right to act upon them.
4. SAME — WARRANTY. — When such an instrument is sued upon as a warranty, the action must be in the name of the person to whom such warranty is addressed, and cannot be maintained by a purchaser of the certificate who has no assignment of the cause of action upon the warranty. The action in such a case is *ex contractu*.

On demurrer to the petition.

This is an action to recover damages on the ground of alleged false and fraudulent representations made by the defendant, and the material facts alleged are the following:

First. That the defendant was, on the twenty-second of November, 1875, duly appointed receiver of the property and effects of the Chicago, Clinton & Western Railroad Company, by an order made by the district court of Clinton county, Iowa, in a cause therein pending.

Second. That afterwards, on the twenty-seventh of July, 1876, said court made an order authorizing the defendant, as receiver, to construct and build all the unconstructed portion of the line of said railroad from Clinton to Iowa City, Iowa, and to repair other portions, for which purpose he was authorized and empowered to borrow, on certain terms, such sum or sums of money, and to make such indebtedness as should be necessary — not to exceed $8,000 per mile upon the whole line of said road completed and to be completed, and to make and issue to the persons of whom said money might be borrowed and to whom such indebtedness might be due, but only such as might be incurred by him, his debentures or certificates, with interest expressed in their body, or in coupons, or interest warrants thereto attached, signed by him as receiver, but not personally, which debentures were to be held as receiver's indebtedness, and as such decreed and adjudged to be a first lien for the principal and interest thereof upon the entire line of said railroad, etc.

And in case of default in the payment of such debentures or certificates, principal or interest, according to the terms thereof, any holder thereof might institute or prosecute a suit in his or their names to enforce the lien and compel payment thereof.

Third. That on or about the twentieth of January, 1877, the defendant made and delivered to the Joliet Iron and Steel Co. five several certificates or debentures, all of like tenor, and one of which is as follows:

"EXHIBIT B.

"Receiver's certificate, referred to in above petition:

"No. 28. $5,000.

"Office of the receiver of the Chicago, Clinton & Western Railroad, Clinton, Iowa, January 20, 1877.

"This is to certify that there is due on July 16, 1877, to the Joliet Iron & Steel Co., or bearer, from Edward H. Thayer, as receiver (but not personally) of the Chicago, Clinton & Western Railroad, appointed by the district court of the state of Iowa in and for Clinton county, five thousand ($5,000) dollars, with interest thereon from this date at the rate of seven per cent. per annum, on account of indebtedness incurred by said receiver. This obligation is issued under and by virtue of certain provisions of an order duly entered by the district court of Clinton county, Iowa, on July 27, 1876, and is one of the series of receiver's certificates authorized to be issued by such order, and by virtue thereof constitutes a first lien upon the said line of railroad, its appurtenances, franchises and income, being for iron rails furnished for constructing said road. Payable at the Third National Bank, Chicago, Ill. (Signed) Edward H. Thayer, as receiver of the Chicago, Clinton & Western Railroad."

Fourth. That by the terms of said certificates or debentures the said defendant acknowledged and certified that there was due the said Joliet Iron & Steel Co., or bearer, from Edward H. Thayer, as receiver (but not personally), the sums named therein with interest, on account of indebtedness incurred by said receiver; that said obligation was issued under and by virtue of the provisions of the order of court above named, and was one of the series of certificates authorized to be issued by said order, and by virtue thereof constituted a first lien upon the said line of railroad, etc., being for iron rails furnished for constructing said railroad.

Fifth. That afterwards, and before the maturity of said certificates, the plaintiff, believing that said certificates were duly made and issued by said defendant under and by virtue of the

provisions of said order of court, and that the same were of the series of receiver's certificates authorized to be issued by said order, and that the same were made and issued by said defendant for iron rails furnished for constructing said road, and relying thereon, and upon the said statements and representations contained and made in said certificates, purchased the said certificates from the payee in good faith and in the usual course of business, and without notice or knowledge that the said statements and representations were not true, and paid and advanced to said company therefor the sum of twenty-five thousand dollars, that being the amount expressed upon their face as due and payable thereon.

Sixth. That after maturity of said certificates, plaintiff demanded payment, which was refused, and that afterwards plaintiff instituted proceedings to enforce the lien of said certificates upon said line of railroad, etc., in the district court of Clinton county, Iowa, and that said court by its judgment refused to enforce the said lien or compel the payment of said certificates, which said judgment or decree was afterwards affirmed by the supreme court of the state of Iowa.

Seventh. It is further averred as follows: "And the plaintiff further says that said defendant wrongfully, fraudulently and falsely certified and represented in and by said certificates that the same were issued by him in pursuance of said order heretofore referred to, and that they were each of the series of receiver's certificates authorized to be issued by such order, and constituted a first lien upon the said line of railroad, its appurtenances, franchises and income, and that they were issued for iron rails furnished for constructing said road, whereas, in truth and in fact, the said certificates were not made and issued by said defendant under and in pursuance of said order, nor were they of the series of receiver's certificates authorized to be issued by such order, nor did they constitute a first lien upon the said line of railroad, its appurtenances, franchises and income, nor were they issued for iron rails furnished for constructing said road; and the plaintiff further says, that by

reason of the premises it has sustained damages in the sum of $30,000."

Eighth. The second count of the petition repeats the foregoing allegations in substance, omitting the allegation as to fraudulent representations, and charges that the representations were untrue, and that because they were untrue the certificates were invalid, and the plaintiff sustained damage, for which the defendant is liable.

The grounds of demurrer are stated in the opinion.

E. S. Bailey, for plaintiff.

Geo. B. Young, for defendant.

McCrary, *Circuit Judge.*— We will consider the grounds of demurrer to the first count in the order in which they are presented by counsel.

First. It is insisted that the facts alleged do not constitute fraud.

The allegation is that defendant wrongfully, fraudulently and falsely certified and represented that the certificates were issued in pursuance of the order of the district court of Clinton county, Iowa; that they constituted a first lien, and that they were given for iron rails furnished for constructing said road; whereas none of these things were true.

It is said that a fraudulent intent is not alleged; but it is difficult to see how representations as to a matter of fact can be wrongful, fraudulent and false without they are made with a fraudulent intent.

It is certainly necessary to prove the intent, and of course it must be alleged, but no form of words is necessary. If the terms employed by the pleader, taken in their ordinary signification, necessarily include the idea of a fraudulent intent, that is enough. We must give to the term "fraudulently," as found in the petition, the meaning which the law gives it, and which attaches to it in common usage, to wit: a deliberately planned purpose and intent to deceive and thereby gain

an unlawful advantage. After stating what representations were made with sufficient particularity, it is enough to aver that they were wrongful, false and fraudulent.

It is not necessary in such a pleading to define the meaning of these terms; and to say that the representations were made with intent to deceive, would add nothing to the allegation that they were falsely and fraudulently made. *Langsdale* v. *Girten*, 51 Ind. 99; *Thomas* v. *Beebe*, 25 N. Y. 244; *Bayard* v. *Malcom*, 2 Johns. 550; *Norris* v. *Mil. Dock Co.* 21 Wis. 131; *Watson* v. *Chesire*, 18 Iowa, 202.

Second. The next proposition of defendant's counsel is that the first count of the petition is bad, because there is no allegation of fraud practiced by defendant upon the Joliet Iron and Steel Company, the payee of the certificates, or upon any one else. The petition does not state that the false and fraudulent representations were made with the intent to defraud any particular individual, but it does state in substance, that they were contained in certain written instruments, payable to the Joliet Iron and Steel Company or bearer, and that relying upon the statements and representations contained in said instruments, the plaintiff purchased them from the payee, in good faith, in the usual course of business, before they were due, and without knowledge or notice that said representations were false, and paid their full face value.

Is this sufficient? To state the question as concisely as possible, it is this: Assuming that the representations contained in the certificates were false and fraudulent, that is, made with intent to deceive, are we to assume that they were made with intent to deceive whoever should purchase the paper?

In the very nature of the case the defendant must have intended that his representations would or might be acted upon by any person or persons purchasing the certificates in the open market. He was placing paper upon the market, where it was likely to be bought and sold. The certificates were so drawn as to facilitate their negotiation; they were to pass from hand to hand without indorsement; they were to be payable

to bearer. Why is not it a sound rule of law and of morals that makes the signer of such paper liable in damages to any one who may be deceived and injured by having relied upon statements of fact fraudulently inserted therein? To say that it is necessary for plaintiff to show that defendant had a particular individual in view as the person to be defrauded, would be in effect to release him from liability for his representations; for a person who places such paper upon the market cannot know into whose hands it will pass, and therefore cannot have in view the person or persons who may be injured.

The matters of fact stated in the certificates gave them currency; if true, they made them amply secure, and very desirable as investments. The controlling question is, who had the right to act upon the representations, since the law will presume that they were addressed to all persons having such right? Is there anything on the face of the paper to indicate that the representations were addressed to and intended for a particular individual, and to no others? I think, on the contrary, the representations were manifestly intended to be considered and acted upon by purchasers of the paper in the market.

In *Bruff* v. *Mali*, 36 N. Y. 200, 205, it was held that officers of a railroad corporation were liable to any person injured by their misconduct in issuing false certificates of stock, and inducing a party to purchase the same by false and fraudulent representations as to the affairs of the company.

And see to same effect the following authorities: Bigelow on Fraud, 89, 90; *Cazeau* v. *Mali*, 25 Barb. 598; *Bartholemew* v. *Beatty*, 15 Ohio, 660; *Railroad Co.* v. *Schuyler*, 34 N. Y. 30.

There is nothing in the authorities cited by defendant's counsel which, rightly understood, is in conflict with this rule. It is very true that an innocent misrepresentation — an honest mistake — cannot be made the ground of an action for fraud.

There must be an intent to defraud by false representations.

This must be alleged and proved. We hold that it is sufficiently alleged by the plaintiff. If it is not true, let the defendant join issue.

We cannot give judgment in his favor while he stands here admitting the allegations of the petition. We construe the allegations of the petition to mean that defendant executed and placed upon the market certain instruments payable to bearer, and containing upon their face false representations intended to deceive the purchasers thereof, whoever they might be. This being so, if the plaintiff purchased them in good faith, before maturity, without notice, relying upon the representations, he may recover, although the defendant had no purpose to defraud and deceive the plaintiff in particular, when he executed the instruments.

There is sufficient privity between the defendant and any purchaser of the certificates to support the action. Nor is it any answer to say that the Joliet Iron and Steel Company, the payee of the certificates, must have participated in the fraud. The action is based upon the defendant's written representations contained in the body of the certificates, and upon these alone.

If we were at liberty to assume that similar false representations must have been made by the Iron and Steel Company to the plaintiff, this would not release the defendant from liability, nor would it be necessary to join the Iron and Steel Company as a party defendant. The liability of the defendant depends upon the question whether he committed any fraud by his own conduct and representations, and it is not to be defeated by showing that others have, or have not, committed like frauds. If, for example, the paper in question had passed through the hands of a number of persons after it left those of defendant, each in turn making the same false and fraudulent representations as to its validity, would it be insisted that the last purchaser would be obliged to join all the previous holders in one suit? How could he know who had held and transferred by delivery the paper, except in the case of the person from

whom he obtained it? He might sue that person, but in order to recover, it would be necessary for him to allege and prove that he relied upon *his* representations and not upon those embodied in the instrument. If he relied upon the latter, and acted in good faith upon them, his right of action would be against the maker of the paper — the party who, by signing it and placing it upon the market, certified to the truth of the statements it contained, and gave it currency.

In all such cases it is of course necessary for the plaintiff to show that he acted upon the false representations, and that he had a right to act upon them.

If the party suing is not the party to whom the false representations were made, it must appear that they were made with the intent that they should be acted upon by third parties, and that they were acted upon by him. The English cases cited by counsel for defendant illustrate and enforce this doctrine, and show that all that is required of the plaintiff, here, is to show some direct connection between the defendant and himself in the communication of the certificates, and its influence upon plaintiff's conduct in becoming a purchaser thereof. *Barry* v. *Croskry*, 2 J. & H. 117; *Deck* v. *Gurney Law Rep.* 6 House of Lords, 377; and Thompson on Liability of Officers, etc. 309.

We have seen no case which holds that it must be made to appear that the fraudulent representations were made directly and individually to the plaintiff. It is enough if he was authorized to act upon them, and did so. If it be true that the defendant issued the certificates honestly and in good faith, believing he had the right to do so, this is a perfect defense, but must be pleaded by way of answer. The petition being taken as true does not show such a state of facts.

Third. The second count omits the charge of fraud contained in the first, and is founded upon the theory that the representations contained in the certificate were warranties upon which the plaintiff has the right to sue and recover. In order

to sustain the sufficiency of this count it would be necessary to hold:

1. That the representations contained in the certificates were warranties upon which the payee, the Joliet Iron and Steel Company, could have maintained an action. And

2. That the plaintiff, as a subsequent purchaser of the paper, without an assignment, became entitled to maintain an action upon the warranty.

As to the first proposition, it is not averred that the Joliet Iron and Steel Company relied upon the representations or were in any wise deceived or defrauded thereby. On the contrary, it would seem that that company must have known all the facts known to the defendant, as it is fairly to be inferred from the face of the certificates that they were given to said company in payment for iron rails furnished by it. Such being the fact, it is manifest that the company could not have maintained an action upon the warranty.

A right of action upon a warranty, if it be assignable, is certainly not negotiable in the sense that the assignee may take a better right than the assignor possessed; and it follows from this, that the plaintiff, even if regarded as the assignee of the right of action upon the warranty, can have no better right than its assignor.

And since the petition does not show that the assignor had any right of action upon the warranty, it does not show any right of action in the plaintiff.

As to the second proposition, we know of no authority in its support. A warranty is addressed to some particular person, and ordinarily that person alone can sue upon it. Under the very broad statute of Iowa on the subject of the assignment of causes of action, it might be assignable; but that it goes without assignment in a case like the present, we think cannot be maintained.

There is a clear distinction between a warranty and a fraudulent misrepresentation. The former is a contract, and the

action upon it is an action on contract. It is an action which can be maintained only by a party to the contract. The latter is a fraud, a wrong for which an action *ex delicto* lies in favor of the person injured.

We conclude that the plaintiff can recover upon the facts stated in the first count, upon proving the intent to defraud by executing the certificates and placing them upon the market, but he cannot recover alone upon the facts stated in the second count.

The demurrer is overruled as to the first count and sustained as to the second.

LOVE, *District Judge*, concurs.

FRAZER & CHALMERS *v.* COLORADO DRESSING & SMELTING CO. and others.

(District of Colorado. December, 1880.)

1. JURISDICTION — CREDITORS' BILL.—A federal court may entertain jurisdiction of a creditors' bill, although the parties to the suit may be compelled to testify under an act of congress.
2. SAME — SAME.— Such court may entertain jurisdiction of such bill although the code of the state gives special proceedings, having in view the same purpose, to reach any property of the judgment debtor, and subject it to execution under the judgment.

In equity. Demurrer.

M. B. Carpenter, for plaintiff.

L. C. Rockwell, for defendant.

HALLETT, *District Judge.*— This is a creditors' bill, and a demurrer was put in upon the ground that there was no jurisdiction in equity in such matters, because the parties may now be compelled to testify under the act of congress; and also

upon the ground that the code of the state gives special proceedings, having in view the same purpose, to reach any property of the judgment debtor, and subject it to execution under the judgment.

As to the first ground, it is enough to say that this is not a bill for discovery only. It may be true as to bills for discovery, and especially where the discovery is sought in aid of an action at law, that there is no reason for entertaining them, since the statute allows parties to be examined, and all persons to be examined as witnesses in the cause. But this is not a bill of that character. It is true it seeks to discover what property and effects the company may have which may be subject to execution. But it also seeks to bring the property into a situation in which it may be reached by the execution under the judgment, or to subject the property itself, when it shall be found, to the payment of the judgment. The purpose of the bill is something more than mere discovery. It is to reach the property and have it applied to the payment of the judgment. And it is one of the oldest heads of equity jurisdiction in proceedings of this kind, to secure to creditors the payment of their judgments, when the property of a debtor has been put in a situation in which it cannot be reached by execution at law.

Now, as to the statute of the state which gives a remedy for reaching the property and effects of a judgment debtor, the examination of the debtor himself and all persons who may have knowledge as to the disposition of his effects, in a proceeding supplementary to the suit in which the judgment was obtained, it is only necessary to say that it is a special proceeding, which does not in any way affect the equity jurisdiction of this court.

There are many decisions of the supreme court to the effect, generally, that the authority and jurisdiction of the federal courts is not subject to the control of state legislation. And there are two decisions of circuit courts which I regard as directly in point in relation to such statutes as this. The first

of these is the case of *Cropper* v. *Coburn*, reported in 2 Curtis Reports, 465. A statute of Massachusetts provided that when an attachment should be levied upon the interest of one of several copartners in the partnership effects, other partners should be at liberty to give to the officer a bond to pay to the attaching creditor the appraised value of the debtor's share of the property attached. Upon bill filed in the circuit court to restrain the officer and the plaintiff in the attachment suit from levying a writ on partnership effects, it was held that the equity jurisdiction of the court was not at all affected by the statute of the state.

And in *Byrd* v. *Badger*, McAllister, 443, the precise question here presented arose in the circuit court for the district of California. That was a proceeding in the federal court under the statute of California, supplementary to execution. That statute is similar to our own, if not exactly the same, and it was held upon full consideration that the statute was of no force or effect in the federal courts.

The demurrer to the bill will be overruled.

CROOKS, Assignee, *v.* STUART *et al.*

(District of Iowa. May, 1831.)

1. MORTGAGE OF PERSONAL PROPERTY — DELIVERY.— At common law a secret conveyance of personal property, without delivery, was fraudulent and void as to all who should deal with the vendor upon the faith of his ownership.
2. SAME — STATUTE OF IOWA.— The statute of Iowa provides that "no sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice," unless the instrument is executed and recorded as conveyances of real estate are required to be executed and recorded. The ruling of the supreme court of Iowa, that a mortgage of personal property, when recorded, is good as against a creditor of the mortgagor who becomes such after the execution and before the recording of the in-

strument, being a decision upon a question of the construction of a state statute, is a rule of decision for this court; but if it were an open question, this statute would be construed as merely declaratory of the common law rule above stated.

3. SAME — DEALING WITH THE MORTGAGED PROPERTY BY MORTGAGOR AS IF IT WERE HIS OWN.— Independently of the statute the law is, that where the mortgagor of a stock of goods remains in possession, and continues to sell, dispose of and deal with the property as if it were his own, the mortgage not being recorded, the same is void as against a creditor of the mortgagor who becomes such without notice of the mortgage. This being a question of general law, this court is bound by the decisions of the supreme court of the United States upon the subject.

Phillips, Goode & Phillips, for complainant.

Barcroft, for respondent.

MCCRARY, *Circuit Judge.*— The complainant, as assignee in bankruptcy of A. J. Nutter, bankrupt, and as representing the creditors of the bankrupt estate, brings this bill to set aside two certain mortgages executed by the bankrupt upon a stock of merchandise, and to subject the same to the payment of the debts of the estate.

The mortgages are assailed upon the ground that the mortgagor retained the possession of the goods mortgaged, and used and disposed of the same as his own; and upon the further ground that the mortgage was not recorded until after the debts, represented by complainant, were contracted.

One of the mortgages expressly provided that the mortgagor might dispose of the goods in the usual course of business; the other contained no such provision, but it appears that there was in fact no change of possession, and that the mortgagor, after the execution of both mortgages, and with the assent of the mortgagees, retained the possession and continued to carry on the business, buying and selling in the usual course of trade, for about one year before the mortgages were recorded, and for a little more than a year before possession was taken under them.

The debts represented by the complainant were contracted

while the mortgagor was in possession and before the recording of the mortgages, and the creditors had no notice of any incumbrance upon the property.

The statute of Iowa provides as follows: "No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged, like conveyance of real estate, and filed for record with the recorder of the county where the holder of the property resides." Code 1873, sec. 1923.

Two questions have been elaborately discussed by counsel, to wit:

First. Whether, under the statute, a mortgage of personal property, not recorded, is valid as against a subsequent creditor who becomes such without notice of such mortgage?

Second. Whether, independently of the statute, a mortgage of personal property, where the mortgagor retains the possession and deals with the property as his own, is valid as against a creditor of the mortgagor who becomes such without notice of the mortgage?

The first of these, being a question as to the true construction of a statute of the state of Iowa, we are constrained to follow the decisions of the supreme court of the state, however much we may doubt the soundness of those decisions.

Were this an original question we should hold, without hesitation, that the statute was enacted to prevent the perpetration of fraud by the sale or mortgage of personal property, without the delivery of the possession, and without notice to persons subsequently dealing with the vendor or mortgagor.

Independently of any statutory provision, a manual delivery of the mortgaged property to the mortgagee would be necessary to the validity of the instrument.

This rule of the common law had its foundation in the doctrine that possession of personal property is *prima facie* evi-

dence of ownership. To allow the owner of such property to transfer the title by a *secret* conveyance, while retaining the possession and assuming to act as the owner, was regarded at common law as permitting a fraud upon all who should deal with him upon the faith of his ownership.

His possession and apparent ownership, it was believed, gave him credit and afforded him the means of defrauding others.

The purpose of the legislature in enacting this statute was not, in our judgment, to set aside this wholesome doctrine, and thus enable dishonest persons to commit fraud by means of secret chattel mortgages; it was only to substitute recording for delivery.

If thus construed, the statute affords a protection against fraud quite as effectual as that given by the common law; but if we hold that a secret unrecorded sale or mortgage may be enforced as against a creditor who deals with the vendor or mortgagor in ignorance of its existence, unless such creditor shall, by attachment or otherwise, obtain a lien before having notice of the instrument, it seems to us that the door for fraud is left wide open.

One who gives credit to a merchant in the open and exclusive possession of a stock of merchandise upon which there is no recorded lien, has a right to assume that he is dealing with the owner of such stock, and to rely upon such ownership in extending credit. If he is to be affected by any secret lien upon such stock, which may be recorded before he secures a lien by levy or otherwise, it will generally happen that the first notice to him upon which he can make an affidavit for attachment will be the recording of the lien, so that the circumstance that gives him the right cuts off the remedy.

If, therefore, we were at liberty to construe the statute for ourselves, we should unhesitatingly hold the mortgages in question in this case to be void under the statute. But the supreme court of Iowa, whose decisions upon the construction of state statutes are rules of decision in this court, have reached, upon this question, a different conclusion.

By a series of decisions that court has held that an unrecorded mortgage of chattels, where the mortgagor retains possession, is valid as against creditors who receive notice at any time before obtaining a lien by levy or otherwise. *Hughes* v. *Cory*, 20 Iowa, 399; *Allen* v. *McCalla*, 25 Iowa, 465; and other cases cited in note to the case of *Cragin* v. *Carmichael*, 2 Dillon, 519.

The question remains, whether these mortgages should be held void independently of the statute, upon the ground that the mortgagor retained the possession of the property, with power to dispose of the same in the usual course of trade.

As already stated, the proof shows that the mortgagor remained in possession and continued the business with the assent of the mortgagees. The case of *Robinson* v. *Elliott*, 22 Wallace, 513, is, we think, conclusive of this controversy.

It was there distinctly held that a mortgage of chattels which permitted the mortgagor to remain in possession until default in payment of the debt secured, with power to sell the goods as theretofore, was fraudulent and void in law, and could not be enforced by a court of equity.

Mr. Justice Davis, who delivered the opinion of the court, expressed the opinion that to sustain the validity of such a transaction would be to permit the mortgagors, under cover of the mortgage, to sell the goods as their own and appropriate the proceeds to their own purposes; and he adds, that "a mortgage which in its very terms contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose."

This is a doctrine of general jurisprudence not depending for its support upon any provision of state law, and we are, therefore, bound by the decision of the supreme court of the United States.

If there be anything in the decision of the supreme court of Iowa, in *Jordan* v. *Lendrum*, 10 N. W. R. 9, inconsistent

with the doctrines announced in *Robinson* v. *Elliott*, *supra*, we must follow the latter and not the former.

It is suggested that the mortgages in controversy, being good as between the parties, are also good as between the mortgagees and the assignee in bankruptcy of the mortgagor; but the rule is well settled that the assignee represents the rights of creditors, and may attack conveyances made by the bankrupt in fraud of his creditors.

The assignee may prosecute any suit to recover property in the hands of third parties, or to enforce the payment of claims that could have been prosecuted by the creditors themselves had not proceedings in bankruptcy been instituted.

There will be decree for complainant.

LOVE, *District Judge*, concurs.

DELMONICO *v.* ROUDEBUSH AND OTHERS.

(District of Colorado. December, 1880.)

1. CONTRACT — CONVERSION.— The part owner of a contract for the purchase of a mine cannot use the same for the purpose of obtaining the title to the mine for a third party, without the consent of his associates.
2. SAME — SAME.— In such case an associate is entitled to share, in proportion to his interest in the contract, in the property obtained by such part owner for his individual benefit through the use of such contract.
3. SAME — SAME.— Such claim by the associate will not be defeated by the fact that the property obtained by such part owner was not wholly in return for the use of such contract.
4. SAME — SAME.— A. and B. were part owners of a contract for the purchase of a claim to a mine. A. used such contract for the purpose of procuring such claim for C. without the consent of B., and also secured another outstanding title for the benefit of C. In return for these services, C. gave A. an interest in the mine. *Held*, that B. was entitled to an interest in A.'s share of the mine proportionate to B.'s interest in the original contract.

In equity.

M. B. Carpenter and *Elihu Root*, for plaintiff.

J. Y. Marshall, for defendants.

HALLETT, *District Judge.*— In the month of May, 1879, Irving Howbert and others were in possession of the Robert E. Lee mine, near Leadville, and engaged in working it. These persons resided at Colorado Springs, in this state, and from that circumstance, and to distinguish them from other claimants of the same property, they are called in the pleadings the Colorado Springs party. Other persons claiming adversely to the Colorado Springs party resided in Denver, and they are called in the pleadings the Denver party. Harmon F. Lee and Charles Stockbridge constituted a third party who claimed the same mine in opposition to both the others. On the tenth of May, 1879, Lorenzo D. Roudebush, a defendant to this bill, agreed with James V. Dexter, who represented the Denver party, to purchase that title for the sum of $155,000, payable within ninety days. The agreement appears in a letter from Dexter to Roudebush, in which the former agrees to give a title bond for the property upon the payment of $10,000 on or before the seventeenth of that month. The time for such payment was afterwards extended to the twenty-seventh of May. No bond was ever given in accordance with this proposal, but the $10,000 was paid, as will be hereafter stated. On the fifteenth of May, 1879, Roudebush obtained from the Colorado Springs party a bond to convey their interest in the property upon payment of $135,000 within sixty days, $10,000 of which was to be paid on or before May 16, 1879. With these papers Roudebush went to New York, arriving there about the twentieth of the same month of May, and entered into negotiations with James M. Selover, a broker, residing in that city. Such negotiations resulted in an agreement by which Selover was to furnish the money to purchase the property — amounting to $300,000 — for an interest of five-eighths in the mine, Roudebush retaining three-eighths. Thereupon, Selover applied to the plaintiff, Charles Delmonico, who agreed to take an interest of one-sixteenth in the mine, and to pay $5,000 of the $20,000, which, as before stated, would become due under the agreements on the twenty-sixth

and twenty-seventh of the month of May. Selover also applied to John P. Jones, who in turn applied to Jerome B. Chaffee, and Chaffee agreed to pay $15,000 of the $20,000 before mentioned, and to take an interest of six-sixteenths in the mine for himself and Jones. These sums were accordingly paid to Selover by Delmonico and Chaffee by checks drawn on banks in New York, and these checks were turned over to Roudebush and by him applied to the payment of the sums falling due under the agreements aforesaid on the twenty-sixth and twenty-seventh of May.

To determine the relations of the several parties at this point of time, that is to say, after $10,000 had been paid upon each of the agreements, it may be useful to recount that Roudebush had obtained an agreement to purchase the interest of the Denver party for the sum of $155,000, payable on or before August 8, 1879, of which $10,000 had been paid out of money furnished by Delmonico and Chaffee; that Roudebush had also an agreement to purchase the interest of the Colorado Springs party for the sum of $135,000, payable on or before July 15, 1879, of which sum $10,000 had been paid out of moneys furnished by the same parties; and the property, when purchased, was to be held by the parties as follows, that is to say: Chaffee, three-sixteenths; Jones, three-sixteenths; Delmonico, one-sixteenth; Selover, three-sixteenths, and Roudebush, six-sixteenths. Some changes were afterwards made in the stipulations of the parties, not very material to be noticed in this connection, as that the amount of the purchase money to the Denver party was reduced by $50,000, making the aggregate to be paid to that party only $115,000; and Chaffee's interest in the property was enlarged by contributions from Selover and Roudebush. But the interest of the plaintiff was not in any way changed by these negotiations, and all of the parties named retained some interest in the contracts as intending purchasers.

At the time the arrangement with Delmonico and Chaffee was made, it seems that some hope was entertained that the purchasers would be able to obtain possession of the property

upon the payment of the $20,000, and that they would be able to take from the mine the balance of the purchase money within the time limited for its payment. But there was nothing in the agreement to warrant such expectation; and, in fact, the bond of the Colorado Springs party expressly provided that the grantors should retain possession until final payment should be made.

Soon after the payment of the money, and probably about the first of June, 1879, application was made to the Colorado Springs party to deliver possession to the purchasers, which application was refused; and then, if not before, it must have been known that the entire sum would have to be raised to complete the purchase. Upon this it seems to have been understood that Chaffee and Delmonico would pay the entire amount — the latter according to the interest to be acquired by him, one-sixteenth of the whole, and Chaffee to pay the remainder.

Before the money became due to the Colorado Springs party, Jones and Chaffee came to the state apparently with the view to complete the purchase, and after some examination of the property and the title to it, Chaffee declined to go on, upon the ground that the Lee and Stockbridge title was outstanding; and thereupon it is conceded that the contract with the Colorado Springs party expired by its own limitation. Some time remained — that is to say, until the eighth of August — before the contract with the Denver party would expire, and in this interval Roudebush entered into negotiations with the Denver party with a view to acquire their interest for the Colorado Springs party. He also arranged for the sale of the Lee and Stockbridge title to the Colorado Springs party, and this probably entered into the purchase of the Denver party's title. The evidence is not clear on that point, but it is shown that $10,000 was paid for the Lee and Stockbridge title, of which the Denver party contributed one-half and the Colorado Springs party one-half; and probably this arrangement could not have been made except upon some understanding as to the

settlement of all controversies between the parties. It is hard to believe that these two parties would have come together to purchase the Lee and Stockbridge title without some accommodation of the controversies then pending between them.

In the last days of July, the sale by the Denver party to the Colorado Springs party was effected through the agency of Roudebush, and the principal question in the case is whether this was done pursuant to the contract between Roudebush and the Denver party. Upon that question there are several circumstances of great weight. Although the contract was not completed by the conveyance from the Denver party to the Colorado Springs party until some time afterwards, the agreement was, in fact, made during the life of that contract; that is to say, before the eighth day of August, 1879. And, at the time the agreement was made, Roudebush was in a position to enforce a conveyance of the property from the Denver party. The sum paid for the property was precisely that specified in the contract with Roudebush. And as both parties to the agreement had received large sums of money under the old contracts, it is reasonable to believe that they would deal with each other more favorably on account of such payments. Roudebush, as a defendant in the suit and a witness in the cause, does not claim that any new arrangement was made between the contracting parties, or that the sale was other and different from that specified in the contract between himself and the Denver party. During the pendency of the contract with the Colorado Springs party, that party had been in possession of the property, and had ascertained that it was of great value, and they were gratified with the failure of that contract, and anxious to purchase the adverse titles of the Denver party and the Lee and Stockbridge party. So anxious were they that they agreed to give and did give to Roudebush one-fifth interest in the property for his services in getting in those titles. All the circumstances of the transaction by which the Colorado Springs party acquired full title to the property lead to the conclusion that the contract with the

Denver party was used to bring about that result. In that way the defendant, Roudebush, gained an interest of one-fifth in the property, and the question for consideration is whether he shall be allowed to retain that interest as against the plaintiff, who was jointly interested with him in the contract with the Denver party.

In admitting Chaffee and Delmonico to an interest in the contracts in May, and in receiving from them the $20,000 with which to make the first payments under those contracts, it is apparent that Roudebush became in some sense a trustee for them in the further execution of the contracts. Those instruments were made with him personally, and upon the face of them he alone could enforce their terms. Until the money was paid which was furnished by Chaffee and Delmonico, the contracts had no force or effect, so that Roudebush was indebted to them in a substantial way for his position under those instruments. Whatever may be said of the position of Jones and Selover in the transaction, the relations of Chaffee, Delmonico and Roudebush are not doubtful. They were engaged in a common enterprise, in which each was bound to use good faith towards the other. And this was especially true of Roudebush, who held in his own name the contracts in which all of them were interested. The principle which obtains amongst partners, that all members of the partnership shall be loyal to the joint concerns, extends to those who are negotiating for partnership, to the members of joint stock associations, to the directors of corporations, and others who are in the same position of trust and confidence. Collyer on Partnership, 6th ed. 255, and note.

It is believed that the same rule is applicable to all persons who may be engaged in a common undertaking, and any of the associates are entrusted with the interests of the association. Certainly it cannot be said that of several associates, one may turn the joint concerns or property to his own advantage, without the consent of the others. Whatever the relations of the parties may be, if they have united for a common

purpose they must be loyal to that purpose, and no one or more of the number can, without the consent of his associates, appropriate to his own use the property of all. The use of the contract with the Denver party to secure the title of the property in the Colorado Springs party was a conversion by Roudebush of the property of his associates which equity will not sanction. It matters not that by its own limitation the contract would soon expire and thus become lost to the plaintiff. There is nothing to show that the plaintiff would have furnished the money to be paid under that contract, in order to acquire the title of the Denver party; and without such payment the contract must have failed, and all benefit and advantage therefrom would have been lost to plaintiff. But the fact remains that at the time of the appropriation by Roudebush the plaintiff was interested in the contract, and the use of it by Roudebush was without his consent. This is enough to enable the plaintiff to share in the advantages secured by Roudebush from the use of the contract. And the circumstance that something more than securing the title of the Denver party was done by Roudebush will not defeat that claim. It seems that Roudebush obtained the Lee and Stockbridge title also for the Colorado Springs party, but, in a case of this kind, the court will not consider whether there were other elements in the transaction than those upon which the plaintiff may rely. The ground of relief is the wrong done to the plaintiff in the use of his means, and if other considerations entered into the transaction, the plaintiff will not be defeated for that reason. And so it must be said that the plaintiff is entitled to share in the property obtained by Roudebush through the use of the contract with the Denver party, in which the plaintiff was interested. He claims one-sixteenth interest in the mine, according to the terms of his original contract; but as the contracts of purchase were not carried out, and could not be from the failure to pay the purchase money, there is nothing to support that claim. It is more just to say that the plaintiff had an interest of one-six-

teenth in the contract with the Denver party, and that he is entitled to share to that extent in the avails of that contract obtained by Roudebush. Upon the settlement with the Colorado Springs party, it seems that Roudebush was given an interest in the mine of one-fifth, and the plaintiff is entitled to one-sixteenth of that interest.

The cause will be referred to a master to ascertain what income has been received from the mine by Roudebush and Pennock; and when his report shall come in, a decree will be entered for one-sixteenth of the net income from the one-fifth interest, and for a conveyance of one-sixteenth of the said one-fifth.

The United States *ex rel. v.* Labette County.

(District of Kansas. November, 1880.)

1. Mandamus — Office of Writ.—The office of the writ of *mandamus*, when addressed to a public officer, is only to compel him to exercise such functions as the law confers upon him; and if it assumes to go further and order him to do that which by law he has no power to do, it is so far void.
2. Power of County Commissioners — Statute Construed.— Sec. 6, ch. 107 of laws of Kansas, 1876, which authorizes the board of county commissioners to levy and collect taxes to pay certain bonds, and provides that "such tax shall be collected as other taxes are collected and paid out by the treasurer," etc., does not authorize the board to depart from the usual mode of collecting taxes provided by law, by which the board levies, the clerk prepares the tax roll, and the treasurer collects and pays over.
3. Same — Board Cannot be Required to Collect and Pay Over Taxes.— Where a writ of *mandamus* was addressed to the "Board of supervisors of the county of Labette," that being the name in which the county as a corporation is to sue and be sued, and commanded said board to levy, collect and pay over certain taxes: *Held*, that the board was not liable to punishment for contempt because the county clerk and county treasurer of the county had failed to perform their duties in connection with the levy and collection of such taxes; but *held, also*, that the board may be required to proceed against the clerk and treasurer to compel them to perform such duties.

The relator is plaintiff in a judgment recovered in this court, in June, 1877, against Oswego township, in the county of Labette, Kansas, for $9,221.34. By a peremptory writ of *mandamus* issued August 2, 1878, the respondents, the board of county commissioners of Labette county, were commanded to "levy and collect a sufficient tax upon all the taxable property in Oswego township, in the county of Labette and state of Kansas, to pay the above mentioned judgment, interests and costs," and "to cause the said moneys to be paid over to the said Clarence F. Moulton upon the said judgment." The return to this writ showed that the respondents had levied a tax sufficient to pay off the relator's judgment, but did not show that the same had been collected or paid over. Thereupon, on motion of relator, a rule was issued requiring the respondents to show cause why they should not be committed for contempt in not obeying the writ. In answer to this rule the respondents say:

"That, as commanded by the peremptory writ of *mandamus* allowed herein, they levied, as provided by law, the tax therein directed to be levied, as will fully appear by their return to such writ heretofore filed herein and made part hereof, and by a stipulation signed and entered into by the parties hereto and made part hereof. They further say that they did not collect and pay over to the relator herein the taxes so levied, because they have no power, process or authority by which they can collect or control the disposition of the taxes collected, except so much as may be collected for county purposes. That under the statutes of Kansas it becomes the duty of the county clerk to make out the tax rolls each year, and to enter thereon in proper form the several tax charges against each tract of land or item of personal property in the county; and it becomes the duty of the county treasurer to collect these taxes, and to disburse them as provided by law; and in the discharge of these duties those officers are supreme, answerable, however, upon their official bonds for any shortcomings or derelictions in the discharge of these powers; and your respondents say

they are not in the law, and should not in fact, be held responsible for the conduct of other county officials. That in good faith they did everything that under the law they could do, as commanded by the said writ of *mandamus*, and hence pray that they may be discharged with their costs."

To this return the relator demurs, upon the ground that the same is not sufficient in law, and does not show any fact or legal reason why the respondents should not be adjudged in contempt.

Brown & Campbell, for relator.

B. W. Perkins, for respondents.

McCrary, *Circuit Judge.*— 1. Assuming that the return is true in fact, does it excuse the board of county commissioners from the performance of so much of the command of the writ as ordered them to collect and pay over, as well as to levy the taxes to pay relator's judgment? The excuse offered is, in brief, that although commanded to levy, collect and pay over, the respondents are powerless to do more than levy, since the law devolves the duty of collecting and paying over upon another officer of the county, the treasurer, who can only act upon tax rolls to be prepared by the county clerk. The office, and the only office, of the writ of *mandamus*, when addressed to a public officer, is to compel him to exercise such functions as the law confers upon him. When the law enjoins upon such an officer the performance of a specific act or duty, obedience to the law may, in the absence of other adequate remedy, be enforced by this writ. But the writ neither creates nor confers power upon the officer to whom it is directed. It can do no more than to command the exercise of powers already existing. High on Extraordinary Remedies, § 32; *Johnson* v. *Lucas*, 11 Humph. 306; *Houston Tap, etc. R. Co.* v. *Randolph*, 24 Tex. 317; *Williams* v. *Smith*, 6 Cal. 91; *People* v. *Forquer*, Breese, 68; *United States* v. *County of Clark*, 95 U. S. 769.

These principles are established, not only by the cases here cited, but also by many others. Indeed they are among the elementary and fundamental principles of the law of *mandamus*. Applying them to this case, we are brought inevitably to the conclusion that so much of the mandate of the writ as commanded the respondents to perform duties which they had, under the law, no power to perform, was void. It was not competent for the court to devolve upon the respondents any official duty whatever; it was only competent to bring into action — to compel the exercise of powers and duties conferred upon the respondents by law. It is said that this rule will operate oppressively upon the relator by requiring him to institute a separate proceeding in *mandamus* against each of the officers of the county charged with the performance of any duty in connection with levying, collecting and paying over the taxes necessary for the satisfaction of his judgment. The court cannot presume that the officers of a county, sworn to perform these official duties, will so conduct themselves as to make this necessary, especially in view of the fact that the only possible result of such action would be to accumulate costs, to be paid in the end by their constituents. If, however, the apprehensions of counsel for relator in this regard should all be realized, it would still be our duty to declare and enforce the law as it is, regardless of consequences. The courts do not make the law and they cannot change it to suit the convenience of litigants. The remedy by *mandamus* is appropriate and adequate. It may be repeated as often as the occasion requires, and although the debtor corporation or its officers may delay the enforcement and final collection of a judgment by refusing to act except under compulsion, the court rendering the judgment is clothed with ample power to enforce it. If the respondents, or the other county officials, so act as to make it necessary to multiply writs and add costs to the already heavy burdens of the debtor corporation, I see no way in which this court can prevent it. In the case of *Rees* v. *City of Watertown*, 19 Wall. 107, the supreme court of the

United States was asked to sanction a departure from the usual course of proceedings in cases of this character, upon the ground that the municipality had disregarded the mandate of a *mandamus*, *alias mandamus and pluries mandamus*, commanding it to levy a tax to pay the relator's judgment; and the officers, to avoid obedience, had resigned their offices, so that there seemed to be little prospect of enforcing the judgment by the ordinary means. Nevertheless the court said: "The remedy is, in law and in theory, adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. * * * The legal remedy is adequate and complete, and time and the law must perfect its execution."

2. It is suggested by counsel for the relator that the board of county commissioners are authorized by the terms of sec. 6, ch. 107, Laws of Kansas of 1876, to levy and collect the taxes necessary to pay the judgment. That section is as follows: "Whenever any bonds shall be issued in pursuance of the foregoing provisions, it shall be the duty of the board of county commissioners, or the mayor and council of the city, to levy and collect annually, in addition to other taxes, a tax on all taxable property in such county, township or city, sufficient to pay the interest on such bonds as the same shall become due, and to create a sinking fund sufficient to pay said bonds at maturity; and such tax shall be collected as other taxes are collected, and paid out by the treasurer, upon presentation of the coupons or bonds when due at the treasurer's office, or at such place as may be specified in the petition or proposition herein mentioned." This section prescribes no new mode of collecting and paying over these particular taxes. It must be construed as applying the machinery afforded by pre-existing laws to the collection and disbursement of the taxes provided for in that act. True, it provides in general terms that the board of county commissioners shall "levy and collect" the taxes; but it also, in the same sentence, declares that "such

taxes shall be collected as other taxes are collected." This last provision only makes clear what would probably have been the meaning of the section without it, since a general provision, directing the board of commissioners to collect a particular tax, could hardly be held to go further than to require them to proceed according to law to perform that duty through the proper officers and agencies. The section further provides that the tax when collected shall be "paid out by the treasurer on presentation of the coupons or bonds when due at the treasurer's office," etc., which clearly shows that the board of county commissioners were not empowered to perform that duty. Inasmuch as this section provides for the collection of the tax "as other taxes are collected," it becomes necessary to inquire how other taxes are collected under the statutes of Kansas. It is conceded that it is the duty of the county board to make the levy. Who is to collect and pay over? By section 83, chapter 107, Compiled Laws of Kansas, 1879, it is made the duty of the county clerk to prepare annually, immediately after the first Monday in August, a tax roll, which roll he shall, on or before the first day of November, deliver to the county treasurer, charging him "with the amount of the respective taxes assessed on the tax roll." Subsequent provisions of the same chapter provide for the collection of taxes by the treasurer. I have already cited the provision of the statute which makes it the duty of the treasurer to pay over the particular taxes under consideration to the parties entitled thereto. It appears then that the statute requires: 1. That the taxes shall be levied by the board of county commissioners. 2. That the tax roll shall be prepared by the county clerk. 3. That the taxes shall be collected and paid over by the treasurer.

3. It is insisted that the performance of all the foregoing duties by the several officers above named may be commanded by a single writ addressed to the board of county commissioners alone. It is said that, under the laws of Kansas, each county is a corporation under the name and style of "The Board of County Commissioners of the County of ———,"

and that, therefore, a writ addressed to the board is addressed to the corporation, and may command the board, through its several agents, to perform all the duties commanded by the writ. Each organized county within the state of Kansas is a body corporate and politic, and in all suits by or against a county, the name in which the county shall sue or be sued shall be the "Board of County Commissioners of the County of ———." Ch. 25, Comp. Laws of Kansas, 1879, secs. 1 and 5. In *Commissioners* v. *Sellew*, 99 U. S. 624, the supreme court says: "As the corporation can only act through agents, the courts will operate upon the agents through the corporation. When a copy of the writ, which has been ordered, is served upon the clerk of the board, it will be served on the corporation, and be equivalent to a command that the persons who may be members of the board shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for contempt. Although the command is in form to the board, it may be enforced against those through whom alone it can be obeyed. * * * The board is, in effect, the officer, and the members of the board are but the agents who perform its duties. While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them as the representatives of the corporation." In that case the question was whether the writ was properly addressed to the board in its corporate capacity, and it was held that such was the proper practice; that the writ, once served, is retained until the thing is done which is commanded, and it "may at all times be enforced through those who are, for the time being, charged with the obligation of acting for the corporation." It is not decided that a *mandamus*, addressed to the board, may command the performance of duties which the law devolves upon the clerk and the treasurer; no such question was considered. The question in the present case is: Can the members of the board of county commissioners be punished for contempt in failing to collect,

and pay over, the tax levied by them to pay relator's judgment? It is insisted that it was the duty of all the officers of the county, including the clerk and treasurer, to take notice of, and obey, the mandate of the writ addressed to the board. If this were granted, it would not follow that the board should be held in contempt; for if the writ can be regarded as addressed to and operating upon the clerk and treasurer, then those officers may be in contempt for failing to obey it, while the board, if it has performed its duty fully, may be exonerated. The members of the board cannot be punished for a failure of the clerk and treasurer to discharge their duties. But I should have great difficulty in holding that the clerk and treasurer could be punished for failing to obey a writ not addressed to or served upon them, and which does not name them, or command them, in terms, to do anything. I am not prepared to say, that, in such a case as the present, the writ might not run against the corporation, and be served upon the several officers who have duties to perform, commanding each to perform the duty required of him by law with respect to the levy, collection, and paying over, the tax. But that has not been done. The case is one in which, by inadvertence, the command of the writ is too broad; it commands the board to perform the functions which belong to other officials. The remedy is to take a new writ against the clerk and treasurer commanding them to discharge their duties. Such writs will be freely granted at any time.

4. Counsel for relator have suggested that the board have not done all that was in their power in their endeavor to obey the writ. It is said that they might, after levying the tax, institute proceeding in *mandamus* to compel the other officials of the county to go on and collect and pay over, and that they might sue such officials on their official bonds for damages for their failure to do so. I suppose the board could do either or both of these things; and if relator insists, an order may issue directing them to institute such proceedings, or to show cause why they have not done so. But I think the counsel will,

upon a little reflection, conclude that the relief he would obtain in this way would probably prove to be very inadequate. No other remedy is likely to be found so effectual as that which is afforded by the writ of *mandamus*, issued by the court in which the judgment is rendered, and addressed to the official or officials whose duty it is to levy, collect and pay over the taxes requisite for the satisfaction of the judgment. The demurrer is overruled.

Blackwell Thompson & Co. *v.* Walker Bros. & Co. and Deal *v.* Hicht

(Eastern District of Arkansas. October, 1880.)

1. Conditional Sales — Validity of. — Conditional sales were valid at common law, and their validity was not affected by the English statute of frauds, nor are they within the recording acts of the state of Arkansas.
2. Same — Rights of Vendor and Vendee. — Such sales, oral or in writing, are valid in Arkansas, and creditors of, and purchasers from, the conditional vendee acquire no right to the property as against the vendor who has been guilty of no fraud and no laches in asserting his rights.
3. Same — Statute of Frauds. — The statute of frauds of the state of Arkansas (sec. 2597, Gantt's Dig.) has no operation on such sales until the possession has continued in the vendee for five years.

These cases raise the question of the validity of conditional sales.

In the first case the plaintiffs agreed to sell to one Cowger a gin, portable steam engine and fixtures for the sum of six hundred and twenty-three dollars and seventy-eight cents, upon his paying the agreed price. Cowger executed his note for the price, and plaintiffs gave him possession of the articles upon the distinct verbal agreement that the right of property therein should not pass to him, but should remain in the plaintiffs until the price agreed upon was fully paid. The defendants were creditors of Cowger at the time he obtained possession of the chattels from the plaintiffs, and subsequently

recovered judgment on their debt and caused an execution to be levied on the chattels as the property of Cowger. Cowger still owes four hundred dollars on the purchase.

The plaintiffs have filed a petition setting up these facts and asking the property to be discharged from the levy of the execution and the marshal ordered to deliver same to them.

In the last case there was a conditional sale — substantially in the same terms as in the first — of work oxen and wagons; and the difference in the two cases is, that in the latter case the conditional sale is evidenced by a written contract of the parties; and the vendee, without paying the stipulated price for the property, sold and delivered it to the defendant, who purchased it in good faith and without notice of the vendee's want of title; and the plaintiff — the first vendor — has brought an action of replevin for the property.

M. W. Benjamin, for plaintiff, and *Erb & Erb*, for defendant in first case, and *J. M. Moore*, for plaintiff, and *Henderson & Caruth*, for defendant in second case.

CALDWELL, *District Judge.*— Conditional sales were valid by the common law, and their validity was not affected by the provisions of the English statute of frauds, nor are they within the recording acts of this state.

In the case of a chattel mortgage the property and possession of the chattel, in this state, is in the mortgagor, and neither the property nor the possession is changed by the mortgage, but the mortgagee acquires, in the language of the statute, "a lien on the mortgaged property from the time the same is" filed for record. Gantt's Dig. sec. 4288.

In a conditional sale the property in the chattel is separated from the possession, the property remaining in the vendor and the possession only passing to the vendee.

The same thing happens upon the loan, hire or other like bailment of chattels; in all such cases the right of property in the thing bailed remains in the bailor and the actual posses-

sion passes to the bailee. If one loan or hire his horse to his neighbor, he does not have to reduce the contract for the bailment to writing and have it signed, acknowledged and recorded in order to prevent the bailee from making an effectual sale of the horse or his creditors from seizing it on execution for his debts.

The possession of personal property is undoubtedly presumptive evidence of title; but it is also a general rule that a vendor in possession of such property can impart no better title to it than he himself possessed. There are some exceptions to this rule, but the case of a vendee in possession of chattels, not to be consumed in their use, under a conditional contract of sale like these we are considering, is not one of them.

One of the earliest cases in this country on the subject of conditional sales was *Hussey* v. *Thornton*, 4 Mass. 405. In that case the contest was between the vendor and an attaching creditor of the vendee whose debt was contracted *prior* to the conditional sale. The court held the conditional sale valid against the attaching creditor, but in the course of the opinion in the case Parsons, C. J., said:

"Had the demands of these attaching creditors originated while the goods were in the possession of Tood and Worthly (the conditional vendees), so that it might be fairly presumed that a false credit was given them, or had they sold them *bona fide* for a valuable consideration, our opinion would have been otherwise." This expression of opinion was not necessary to a decision of the case before the court, and afterwards when a case did arise making it necessary to decide whether such sales were valid against creditors whose debts were contracted while the vendee was in possession of the property under such conditional purchase, the *dictum* in *Hussey* v. *Thornton* was disapproved, and Parker, C. J., who delivered the opinion of the court, said:

"If the transaction is fraudulent, the vendor setting up a condition to the sale, yet suffering the vendee to be in posses-

sion, exercising full rights over the property, with the intent and purpose of enabling him to obtain credit on the strength of the property, he will not be able to avail himself of such condition, but the sale will be held to be absolute in regard to creditors. But if *bona fide*, and the object of the condition was merely security to the vendor, he shall not lose his property because some creditor of the vendee supposed it to belong to him." *Ayer* v. *Bartlett*, 6 Pick. 71.

Later cases in the same state affirm the law as laid down in *Ayer* v. *Bartlett*, and it seems to be the settled doctrine of the courts in this country. *Armington* v. *Houston*, 38 Vt. 448; *Bigelow* v. *Huntly*, 8 Vt. 151; *Buckmaster* v. *Smith*, 22 Vt. 203; *Chaffee* v. *Sherman*, 26 Vt. 237; *Bradley* v. *Arnold*, 16 Vt. 382; *Paris* v. *Vail*, 18 Vt. 277; *Barrett* v. *Pritchard*, 2 Pick. 512; *S. C.* 3 Am. Dec. 449 and note; *Martin* v. *Baldwin*, 17 Mass. 686; *Merril* v. *Rinker*, 1 Bald. C. C. R. 528; *Blood* v. *Palmer*, 11 Me. 414; *Miller* v. *Bascom*, 28 Mo. 352; *Rogers Locomotive Works* v. *Lewis*, 4 Dillon, 267; S. C. 3 Cent. L. J. 784; and it seems to be equally well settled that the vendor who has been guilty of no laches in asserting his right to the property may recover it from a *bona fide* purchaser from the vendee. *Coggill* v. *Hartford R. R. Co.* 3 Gray, 545; *Ballard* v. *Burgett*, 40 N. Y. 314; *Bigelow* v. *Huntly*, 8 Vt. 151; *Sargent* v. *Metcalf*, 5 Gray (Mass.), 506; *Hurt* v. *Carpenter*, 24 Conn. 427; *Parmelee* v. *Catherwood*, 36 Mo. 479; *Griffin* v. *Pugh*, 44 Mo. 326; *Little* v. *Page*, id. 412; *Benner* v. *Puffer*, 114 Mass. 378; *Thomas* v. *Winters*, 12 Ind. 383; *Dunbar* v. *Rowles*, 28 Ind. 328; *Bailey* v. *Harris*, 8 Iowa, 333.

In this state the settled rule of the common law, that a purchaser of a chattel acquires no better title than his vendor possessed, has not been changed by statute in its application to conditional sales; and creditors and purchasers of the conditional vendee acquire no right to the property as against the vendor, who has been guilty of no fraud and no laches in asserting his rights.

If the property had been of a kind which would have been consumed in its use, a different question would be presented.

Counsel for defendants insist that conditional sales not reduced to writing and acknowledged and recorded are void against purchasers and creditors of the vendee under the statute of frauds of this state. Sec. 2957, Gantt's Digest.

This section of the statute of frauds of this state originated in Virginia at an early day. Though applicable to all goods and chattels, it is said to have had its origin in a practice connected with slave property. It had come to be common for slave owners to transfer the mere possession and use of some portion of their slaves to members of their families, particularly to daughters upon their marriage, by way of loan or upon some verbal agreement or understanding whereby the property in the slaves did not pass with the possession.

The possession thus acquired was often continued for many years under circumstances calculated to mislead persons dealing with the party in possession, and the object of the statute was to make the apparent ownership arising from such possession, whatever the nature of the bailment or trust might be, actual and effectual against the real owner, in favor of creditors and purchasers of one who had so remained in possession for a period of five years.

The section was adopted in Kentucky in 1796, and in the revision of the statutes of that state in 1852, conditional sales were in terms brought within its operation.

It was adopted by the territories of Missouri and Arkansas and by each of those states and Illinois and Texas.

As originally adopted by Kentucky and the territories of Missouri and Arkansas and by the state of Missouri in her first code of laws, it reads as follows:

"Where any goods or chattels shall be pretended to have been loaned to any person with whom or those claiming under him possession shall have remained for the space of five years without demand made and pursued by due process of law on the part of the pretended lender; or where any reservation or

limitation shall be pretended to have been made of any use of property by way of condition, reservation or remainder [or otherwise in goods or chattels, the possession whereof shall have so remained in another *as aforesaid*], the same shall be taken as to all creditors and purchasers of the persons *so remaining in possession* to be void, and that the absolute property is with the possession, unless such *loan*, reservation or limitation of the use or property were declared by will or deed in writing proved or acknowledged and recorded as required by this chapter."

In the Revised Statutes of this state the clause in brackets is omitted except the words "in another."

Whatever the design of this omission may have been — if indeed it was designed, and not a clerical misprision — it is still clear that the words "so *remaining* in possession" in the latter part of the section refer to the "possession * * for the space of five years" previously mentioned. If this be not so, then these words have nothing to rest on and are meaningless. But they are not meaningless; they perform an important office, and make the five years' possession qualify the whole section.

In the revision of the statutes of Missouri in 1835, the words "as aforesaid," italicized in the clause in brackets, were omitted. And in *Miller* v. *Bascom*, 28 Mo. 352, it was insisted that a verbal conditional sale of chattels was a "reservation or remainder" in favor of a vendor and void as against the creditors and purchasers of the vendee without reference to the period of his possession. But the court held otherwise, and declared the act, notwithstanding the omission of these words, had no operation in such cases unless the possession of the chattels had continued in the vendee for five years.

And everywhere and always it has been held that the possession in all the cases of bailment, trust, condition or reservation embraced by the section, must have been continued for five years before the owner's rights are affected.

In the enrolled act there is a comma after the word "lender" and not a semicolon as in the printed statute.

Punctuation marks are no part of the English language and cannot be admitted to control the proper sense of the words used. But they are sometimes used in such a way as to lead to a misinterpretation of a statute on a casual reading, and such is the tendency of the erroneous punctuation in this section.

Conceding, but not deciding, that this section embraces conditional sales, still the defense based on it must fail because the possession of the vendees, under the conditional sales in these cases, was less than a year.

ZOLLARS AND HIGHLAND CHIEF CONSOLIDATED MINING CO. *v.* SETH EVANS.

(District of Colorado. October, 1880.)

1. MINING CLAIMS — REQUISITES TO GIVE TITLE THERETO.— On the public domain a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of one thousand five hundred feet in length and four hundred feet in width, he must prove a lode extending throughout the claim.
2. EJECTMENT — WHAT NECESSARY TO MAINTAIN FOR MINING CLAIMS — BURDEN OF PROOF.— To maintain an action of ejectment for a mining claim, the plaintiff must establish not only that he is in possession, but that a lode had been discovered on the claim prior to the commencement of action, and that such lode so discovered extends from the discovery shaft to the ground for which he sues. These are facts to be determined by the jury from a preponderance of the evidence. As to them, the burden is on the plaintiff.
3. DISCOVERY OF MINERAL, THOUGH MADE AFTER LOCATION, WILL AVAIL AGAINST STRANGERS.— Though the locators of a mining claim may not, at the time of the location and survey of the claim, have sunk their shaft to the discovery of mineral in place, yet, if they shall thereafter so sink the shaft and find the lode, they will hold as against all who had not theretofore acquired an interest in the lode — the discovery relating back to the location.

D. P. Dyer and *C. I. Thomson*, for plaintiffs.

S. P. Rose and *Wells, Smith & Macon*, for defendant.

Charge to the jury:

HALLETT, *District Judge.*—The ground in controversy is claimed by plaintiffs as part of the Highland Mary location. You have observed that it is but a small part of that location, lying at some distance from the discovery shaft, probably six hundred or seven hundred feet. It is the land embraced within the lines of plaintiffs' and defendant's claims, or the space covered by both claims.

It is stated by counsel, and perhaps it appears in evidence, that plaintiffs have another title to the same ground, based on the Highland Chief location, but they have not set up that title in their pleadings, and they cannot rely on it in this action. The only right in them which can be recognized here is that which may arise from the Highland Mary location, and the investigation before you has been confined to that subject. It is not necessary to discuss at length the validity of the Highland Mary location. It is enough to say that the plaintiffs have not shown any right or title to the premises in controversy of date earlier than July 30, 1879; and their right at that time is to be determined upon several facts now to be stated.

In the first place, did the plaintiff corporation, the Highland Chief Consolidated Mining Company, on that day or afterwards, and before the twenty-third day of September, 1879, take possession of the Highland Mary claim under deed from Jed. H. Bascom and others, and hold possession thereof at the last named date?

The twenty-third day of September, 1879, is the time the suit was brought, and in the attitude of the case on the evidence, the plaintiffs cannot recover, except upon actual possession at that time. There is nothing to show that John W. Zollars, who assumes the position of trustee to the corporation, was ever in actual possession of the property. The company appears to have been organized on the thirtieth day of July, 1879, and, of course, not being in existence, it could not enter into possession before that day.

So that, as to possession, the question is whether after the thirtieth of July, and at any time before the twenty-third of September, 1879, and at the last mentioned date, the corporation was in possession.

If you find that to be true, a further question will arise as to whether a lode was discovered in the Highland Mary discovery shaft, and such lode extends from that discovery shaft to the ground in controversy. On the public domain of the United States, a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of one thousand five hundred feet in length and three hundred feet in width, he must prove a lode extending throughout the claim. I do not recall any evidence to show that any of the openings in the ground in controversy were made prior to September 23, 1879

The Highland Chief people had sunk a shaft just outside of the ground in dispute, and in May of this year drifts had been run from that shaft into the ground in dispute. But I do not remember that any witness stated when those drifts were run or when the tunnel which penetrates this territory was made.

And if, in fact, those openings, or any of them, were made before the suit was brought, and the plaintiff corporation was then in possession of them, that fact alone would not enable the plaintiffs to recover *the whole* of the disputed territory.

Such possession of those openings only, without the discovery of a lode in the discovery shaft which extends from thence to the ground in dispute, would not be available beyond the extent of the openings.

And the plaintiffs have not asked for less than the whole territory in dispute, so that you are advised that, in addition to possession in the plaintiff corporation on September 23, 1879, it must appear from the evidence that a lode was discovered in the discovery shaft of the Highland Mary claim, and that such lode extends from that point to the territory in controversy.

On these points no remarks from the court are needed; but

I call your attention to one matter having some bearing upon the question whether the lode, assuming that there is one in the Highland Mary discovery shaft, extends from that point to the ground in dispute. There is some question whether the mineral found in the Highland Chief openings is of the same body as that found in the Highland Mary discovery shaft, and one witness, if I am not mistaken, expressed the opinion that they were not the same. The difference in elevation of the two shafts, and the points at which mineral was found, in connection with the topography of the country, seems to raise a doubt on that subject. If you are of the opinion from the evidence that there are two bodies of mineral separate and distinct from each other, one in the Highland Chief shaft and the territory in dispute very near to that shaft, and another in the Highland Mary shaft, it will be a question of fact on the evidence whether the latter extends under the first into the territory in dispute.

It is incumbent on the plaintiffs to establish these facts by preponderating testimony, and, in the absence of such testimony, you should find for defendant. If, however, those facts are established, the plaintiff may prevail, unless defendant has shown a better title to the ground in dispute.

And your attention will now be asked to the facts necessary to establish such better title.

Much that has been said with reference to the Highland Mary location is equally applicable to defendant's location, which he calls the Eliza — that is to say, a lode must have been found in the discovery shaft, and the lode must extend from that point to the ground in dispute. Perhaps there is some doubt here also whether any body of mineral or mineralized rock that may be called a lode was found in the discovery shaft, and if so found, whether the same body was exposed in the territory in dispute. Those questions are submitted to your decision on the evidence; and assuming that the plaintiffs have established their right, as before explained to you, if you further find that defendant's grantors discovered a lode in the

Eliza discovery shaft, and that such lode extends from thence into the ground in dispute, the defendant will prevail.

Because, as was before explained to you, plaintiffs' right cannot be of earlier date than July 30, 1879; and defendant, if his grantors made a valid discovery and location, dates back to 1878, long prior to the date of plaintiffs' title by possession. It is true that there is some controversy upon the question whether, at the time of the survey of the Eliza lode in July, 1878, the locators had sunk their shaft to the point where they claim to have found the lode; but if they had not done so, they did, in fact, sink it to the point mentioned by September following, and if they then found a lode, they could have advantage of it as against all who had not then acquired an interest in the lode in the same manner as if they had uncovered it before making their survey and filing their certificate.

And if their location was completed by or before September, 1878, it antedates plaintiffs' title by possession in the same manner as it would if it had been completed in July of that year.

In that view the question as to defendant's title still remains, whether a lode was discovered in the discovery shaft, and whether such lode extends from that point to the ground in controversy.

If the plaintiffs have established their title as first explained to you, and the defendant has not established his title, your verdict should be for plaintiffs. If the plaintiffs have failed to establish their title, or the defendant has established his title, your verdict should be for defendant.

Verdict for defendant.

Faxon *v.* Barnard *et al.*

(District of Colorado. November, 1880.)

1. Mining Claims — Certificate of Location — Record.— Certificate of location must be filed of record in the office of the recorder of the county within three months next after the discovery (R. S. 629), in order to secure the claim from date of discovery against intervening claimants seeking to locate the same ground. But failure to so record the certificate will not render the same invalid — provided the requirements of the law be met before any other and better right to the same ground has been perfected.
2. Description of Claim — Reference to Natural Object or Permanent Monument.— The act of congress (R. S. sec. 2324) requires that in the location certificate reference must be made to some natural object or permanent monument. This is in harmony with the statute of the state. (R. S. 630.) But whether so or not, congress has the right to require it, the purpose being to require that the claim shall be definitely described.
3. Without Such Description the Certificate of Location is Void. It is not a compliance with the law to describe a claim as "situated on the north side of Iowa gulch, about timber line, on the west side of Bald mountain. Said claim is staked and marked as the law requires."
4. Rights of Party in Possession.— One in actual possession, having uncovered the lode, though not having filed upon the claim as required by law, cannot be ousted by a subsequent discoverer, as to the ground actually held. And the burden is upon the plaintiff to show that a defendant who had formerly been in possession was not still in possession at the time of his location. A location may be valid up to, but cannot be extended over a senior discovery in the actual possession of another.

G. G. White, for plaintiff.

Markham & Patterson and *Thomas & Campbell*, for defendants.

The cause being heard on motion of plaintiff for temporary injunction, the court held as follows, the facts sufficiently appearing in the opinion:

Hallett, *District Judge.* — Plaintiff claims the Ontario lode as having been discovered by Geo. A. Gibson and others, on the public land, February 11, 1878, and the location completed in July of the same year. Defendants claim the Green

Mountain lode as having been discovered by Benj. Barnard in August, 1877, and the location completed by filing for record a certificate of location in March, 1878. These are rival locations overlapping each other at the north end of the first and the south end of the second to the extent of two and seventeen one-hundredths acres, which is the ground in controversy in this suit. A question common to both claims is, whether a certificate of location must be filed of record in the office of the recorder of the county in which the claim may be, within three months next after the discovery of the lode, as required by the act of assembly of 1874. R. S. 629. In terms the act requires the certificate to be filed within that time, and to secure the claim from the date of discovery against intervening claimants seeking to locate the same ground, it would seem to be necessary to comply with its provisions. But no reason is perceived for saying that the certificate shall be invalid if not filed within the time fixed by law. The design of the law clearly is to give the discoverer time for doing the acts necessary to a proper location. He may sink his discovery shaft within sixty days; he may put up his discovery notice and his boundary stakes, and record his certificate of location within three months; failing in this he shall have no right as against one who has been more diligent in fulfilling the statute, although later in point of time. But when all things have been done as the act requires, before any other and better right to the same ground has been perfected, it seems to be just and entirely consistent with the statute to recognize the location as having been properly made.

Applying this rule in the present case, and accepting the averments of the parties respecting their locations as true, we find that although each overstepped the statute, they may have precedence according to the dates of discovery. Beginning in February, 1878, plaintiff's grantors completed their location in July of that year. It is indeed stated in some affidavits in support of the bill that the Ontario lode was discovered in the autumn of 1877. But we cannot allow the plaintiff to go aside

from, or beyond, the allegations of his bill, and as he has averred that the lode was discovered in February, 1878, that will be accepted as the true date. Beginning in August, 1877, defendants completed their location in March, 1878, at which time plaintiff's grantors had not secured any right to the ground in controversy, as they had not then done all that was required to complete their location. If, then, the matters in issue were to be determined upon the question of priority of discovery and location, defendants' would prevail. There is, however, another objection to defendants' certificate of location, that it does not refer to a natural object or permanent monument from which the claim may be identified. We are not asked to consider what may be a natural object or permanent monument to which reference may be made, or whether the language of the certificate in making such reference is sufficient under the law. For there is not in the certificate anything whatever as to any natural object or monument. It is said that the claim is "situated on the north side of Iowa gulch, about timber line, on the west side of Bald mountain. Said claim is staked and marked as the law directs." It is utterly impossible to find in this language any reference to a natural object or permanent monument defining the location, and the only question is as to the effect of the omission. The act of congress requires such reference to be made in the description of the claim (R. S. sec. 2324), and the state legislature has declared that the certificate shall give "such description as shall identify the claim with reasonable certainty." R. S. Col. 630. Compliance with the act of congress would fulfill all that is required by the state, and it may be said that the acts are in perfect harmony. But if that were otherwise, there is no doubt as to authority of congress nor as to the purpose of the law in requiring that the claim shall be definitely described.

The government gives its lands to those citizens who may discover precious metal ores therein, upon the condition that they will define the subject of the grant with such certainty

as may be necessary to prevent mistakes on the part of the government and on the part of other citizens who may be asking the like bounty. This is reasonable, and necessary to justly administer the law, and therefore it must be said that without such description a certificate of location is void. On that ground the original certificate of defendants' grantor will be rejected, and as the relocation was posterior to plaintiff's, it cannot prevail against the latter. It remains to consider what would be the effect of actual possession by defendants or their grantors at the time the Ontario lode was located. For it appears that defendants' discovery shaft is in the ground in controversy, and they aver that they have been in possession since the lode was first opened. That they have not worked there constantly may be inferred from what has been done, for as the shaft is now only fifty feet deep, it is difficult to believe that three years and more have been occupied in sinking it. But defendants say that they have been on the ground constantly, and plaintiff asserts that they have never been there at all. In this conflict and imperfect statement of testimony, it is impossible on a preliminary motion of this kind to ascertain the fact, and we resort to some general rules which should control.

Plaintiff's position is, and must be, that the lode discovered by his grantors six hundred or seven hundred feet from the ground in controversy, extends from thence to the point occupied by defendants, and that defendants are on the same lode. Assuming that to be correct, the question is whether defendants or their grantors were in actual possession at the time plaintiff's location was made. That they were on the ground before that time is shown by testimony which is not contradicted, and the burden is upon the plaintiff to show that they were not there at the time of his location. For if they were then in actual possession, having uncovered the lode, plaintiff's grantor claiming by subsequent discovery could not oust them so long as they saw fit to remain there. As to the ground actually held by them, although if they failed to locate under the

law they could not claim more, no one by junior discovery could assert a superior title. Plaintiff's location may be valid up to the very point occupied by defendants' grantors, but it must be said that a location cannot be extended over a senior discovery in the actual possession of another. And so the evidence tending to prove that defendants or their grantors may have been in possession of the shaft in controversy at the time of plaintiff's location, and plaintiff having failed to meet that evidence successfully, the motion for injunction will be denied. All assumptions of fact have of course been made on the proofs as they now stand. At the hearing, if the facts should appear to be different, the view now expressed may be modified.

ORMSBY *v.* U. P. RAILWAY COMPANY.

(District of Colorado. November, 1880.)

1. NEGLIGENCE — UNNECESSARY DELAY IN TRANSPORTING FREIGHT — THAT THE COMPANY NEEDED ITS ROLLING STOCK FOR OTHER PURPOSES, NO EXCUSE FOR.— It is the duty of a railroad company, engaged as a common carrier, to transport freight without unnecessary delay. A delay of twenty-four hours at a station on the way is an unnecessary delay, unless excused. That the company needed its rolling stock for the purpose of conveying passengers is not a sufficient excuse. The duty of the company is to be prepared to execute its contracts, both to carry passengers and freight. It cannot excuse itself for failure to do the one, on the ground that it was bound to do the other, and was not able to do both.
2. CONTRIBUTORY NEGLIGENCE — A FACT FOR THE JURY.— If plaintiff by his negligence materially contributed to the injury which he has sustained, he cannot recover. It is for the jury to determine whether the plaintiff, under the circumstances as shown by the proof, acted with reasonable and ordinary prudence, and whether his conduct contributed to the injury which he sustained.
3. A COMMON CARRIER CANNOT RELIEVE HIMSELF FROM RESPONSIBILITY FOR HIS OWN NEGLIGENCE BY CONTRACT WITH THE SHIPPER.— A common carrier cannot relieve himself from responsbiility for his own negligence, or the negligence of his employees, by any contract that he may enter into with the shipper. A contract for shipment, in so far as it assumes to say that the railroad company shall not be liable on account of

any delay in the transportation of stock, is void—and also in so far as it requires the shipper to give notice of his claim before he unloads his stock.

4. "RULES AND REGULATIONS FOR THE TRANSPORTATION OF LIVE STOCK" CONTAINED IN PRINTED STATEMENT APPENDED TO CONTRACT DO NOT BIND THE SHIPPER.—A printed statement appended to the contract for shipment, containing a provision that in case damages occur in transporting live stock the value shall be limited to a given amount; and that blooded animals, or animals deemed especially valuable, will be carried only on special contract, and that agents are not allowed to receive and ship such animals until a proper contract is made between the owner or consignee and the general freight agent, constitutes no part of the contract, and cannot avail as a defense. The shipper is only bound by the stipulations of the contract itself. A common carrier cannot relieve itself from responsibility by mere notice appended to or indorsed upon the contract.

5. THE AMOUNT OF DAMAGES A QUESTION FOR THE JURY.—RULES IN ARRIVING AT—MEASURE OF.—As to the amount of damages, the jury are the judges. It is their duty to consider all the evidence and all the circumstances, and arrive at a just and reasonable determination. The measure of damages (in case of injury to a horse) is not what a man might have made by using him as a racer upon the track, but the reasonable market value in cash at the place where the loss occurred—the actual loss which the plaintiff sustained by reason of the injuries resulting from the negligence of the defendant.

Per HALLETT, *District Judge.*

6. DEMURRER—PLEADING.—A demurrer "to so much of the answer as sets up the special contract" will not be received by the court.

7. RAILROAD—CONTRACT—REASONABLENESS.—A contract between a railroad company and a shipper of horses stipulated that for injuries to the animals shipped over the line of the road the owner should make a demand in writing of the agent of the company before removing them from the place of destination or from the place of delivery. *Held*, that this clause of the contract was not applicable where the injury was the illness of the animals, and the extent of such illness could not be known until their removal from the cars, and probably not for some little time after such removal.

G. W. Wright, for plaintiff.

J. P. Usher and *H. M. & W. Teller*, for defendant.

MCCRARY, *Circuit Judge*, charged the jury orally as follows:

GENTLEMEN OF THE JURY—This is a suit in which the plaintiff seeks to recover damages from the defendant, the

Union Pacific Railway Company, on the ground of negligence in the transportation of a car load of horses.

The plaintiff, in order to recover, must establish two propositions of fact, and of those propositions you are the judges: *first*, that the railroad company was negligent in the matter of delay in transporting plaintiff's horses; *second*, that the result of that negligence was the damage and injury complained of. I will speak to you first only with regard to the plaintiff's case. Presently I will call your attention to the several defenses that have been set up by the defendant. You will then in the first place consider whether the plaintiff has made out *prima facie* a case upon which he is entitled to recover, if the defense is not established — whether the railroad company was guilty of negligence in the matter of delay, because there is no allegation that there was any negligence, except in the delay of twenty-four hours at the station of Brookville, between this and Kansas City. It is the duty of a railroad company, engaged as a common carrier, receiving freight to be transported, to carry it without unnecessary delay. A delay of twenty-four hours at a station on the way is an unnecessary delay, unless it is explained and excused by something which the law recognizes as sufficient. The excuse that the company needed its rolling stock for the purpose of carrying passengers is not a sufficient excuse. The duty of the company is to be prepared to execute its contracts, both to carry passengers and to carry freight; it cannot excuse itself for a failure to do the one, upon the ground that it was bound to do the other, and that it was not able to do both. Therefore, if there was nothing in the case except the fact of a delay of twenty-four hours at this station, and if you should find that that delay was the cause of the injury of which the plaintiff complains, he would be entitled to recover.

But it is incumbent upon the plaintiff to show by preponderance of testimony that the damage to his stock was caused by that delay of twenty-four hours; and that is the next question for your consideration. You are to consider that ques-

tion carefully upon the testimony that has been submitted to you; and it is for you to decide whether in the case of the horses that died, their death was caused by this delay; and as to the others, whether their sickness and the damage to them was the result of the same cause. In considering this question you will look into the evidence which has been offered before you, tending to show that the injury might have resulted from some other cause; and if you find that it did result from other cause, or in other words, if you do not find the evidence sufficient to show that it resulted from this delay, you cannot find a verdict for the plaintiff; as for example, you must consider the condition of the stock when it was shipped at Kansas City, and its condition when it was shipped in Kentucky. If you find that there was anything the matter with the stock, or any of it, before it started from Louisville, that is a fact to be considered, and upon the testimony it is for you to say whether this delay of twenty-four hours resulted in the death of the two horses, and in the sickness and injury of the others complained of.

If you find that the delay was the cause of the injury to the stock, then your verdict will be for the plaintiff, unless you find for the defendant on some of the matters that are alleged by way of defense.

In considering, however, the first question (whether the damage resulted from this delay), you are to consider not only the condition of the stock when it was shipped at Louisville, and when it was re-shipped at Kansas City, but you are to consider the manner of the shipment that has been testified to before you — the fact that the horses were put in stalls, that they were crosswise of the car, and that there were twelve of them on the car, and you are to judge whether that manner of shipment would or would not have resulted in this sickness and death and injury of the horses, independently of the delay of twenty-four hours at Brookville. If you conclude that under all the circumstances the horses would have come through safely, and none of them died, and none of them

suffered injury but for that delay, then the plaintiff has made out a *prima facie* case. But if you conclude that even if the horses had not been stopped at Brookville these two would have died, and the others would have been injured and sick just as they were, then the plaintiff has not made a case, and that is the end of it.

But if upon these questions you find for the plaintiff, you will proceed to consider some of the matters alleged by way of defense; and the only matter that I think I need call your attention to as requiring your consideration is the allegation of negligence on the part of the plaintiff himself. I say to you as matter of law, that if the plaintiff was negligent, and if his negligence materially contributed to the injury which he has sustained, then he cannot recover. And in considering this question, you will look into the evidence upon the points that I have already called your attention to. As for example, you will inquire whether it was negligence in him to ship horses in the manner in which he shipped; whether he acted with reasonable and ordinary prudence in that respect, and if he did not, whether that negligence materially contributed to the results that followed. You will consider whether it was negligence in him to ship the horses in the condition they were in when they left Kansas City, whether prudence required him to delay there, and under all the circumstances whether he was negligent in that respect.

It is also alleged that he had the option of unloading the horses at Brookville, and that he neglected to avail himself of it. Upon this question there is a conflict of testimony. It is for you to decide what the facts are. If he knew that his train was to remain at Brookville a number of hours or a day, and if he had the opportunity to unload the stock and give them rest, and neglected to do it, then it is for you to consider whether that was negligence; and if so, whether that negligence contributed to the injury which he has sustained; but if he expected that the train would start every half hour, and had reason from the representations made to him to expect

that, then it is for you to say whether he was under those circumstances called upon to attempt to unload his stock.

The defendants have set out, by way of defense, a contract, under which they allege that the shipment of this stock was made. The execution of this contract is admitted by the pleadings, and therefore it is before us for consideration. It presents a question which is not without difficulty as a matter of law; at least it would not be without difficulty in some courts of the country, because there is great conflict of opinion among the courts as to how far a common carrier may release himself from responsibility by a special contract with the shipper. In the courts of the United States, however, the law is well settled, and I am therefore without difficulty in instructing you upon this point. It is settled by repeated decisions of the supreme court of the United States, that a common carrier cannot relieve himself from responsibility for his own negligence, or the negligence of his employees, by any contract that he may enter into with the shipper. He may, however, enter into stipulations, which do not relieve him in any degree from his responsibility for negligence, if the shipper assents and agrees to them by a special contract, either verbal or in writing.

Now this contract which is before you, in so far as it assumes to say that the railroad company shall not be liable on account of any delay in the transportation f this stock, is void. It is also void according to the decision rendered by Judge Hallett upon demurrer, in so far as it requires the shipper to give notice of his claim before he unloads his stock. That has been settled by that ruling, in which I concur. In so far as it provides that this plaintiff shall go with the stock and take charge of it, shall take a car, and prepare the car for the use of the stock, and shall see to loading and unloading, and all those particulars, I think it is a valid contract; but as to these particulars, there is no particular conflict in this case.

There is appended to this contract a printed statement, which is headed "Rules and regulations for the transportation of live

stock," and in that statement there is a provision that in case damages occur in the transportation of live stock for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed $200 for a stallion; $100 for a horse; mule, $65; cattle, $50; and other animals $20. And also another provision, that blooded animals, or animals deemed especially valuable, will be carried only on special contract, and agents are not allowed to receive and ship such animals until a proper contract is made between the owner or consignee and the general freight agent.

That, gentlemen, is not in the contract which the plaintiff signed. It is in a print which is on the same sheet of paper with the contract. It has been held by the supreme court of the United States that the shipper is only bound by the stipulations contained in the contract itself; or in other words, that the railway company that proposes to exempt itself from any of its obligations as a common carrier, cannot do it by mere notice, or by printing which is appended to or indorsed upon the contract which is executed; but must do it, in so far as it is lawful to do it at all, by a stipulation in the body of the instrument to which the shipper assents by his signature. Upon this subject I charge you in the language of the supreme court in the case of the *Railroad Company* v. *Manufacturing Company*, reported in the 16th of Wallace's Reports, pages 328 and 329, as follows:

"Whether a carrier, when charged upon his common-law responsibility, can discharge himself from it by special contract, assented to by the owner, is not an open question in this court since the cases of *The New Jersey Steam Navigation Company* v. *The Merchants' Bank*, 6 How. 344; and *York Company* v. *Central Railroad*, 3 Wall. 107. In both these cases the right of the carrier to restrict or diminish his liability by special contract, which does not cover losses by negligence or misconduct, received the sanction of this court. In the former case the effect of a general notice by the carrier seek-

ing to extinguish his peculiar liability was also considered; and although the remarks of the judge on the point were not necessary to the decision of the case, they furnish a correct exposition of the law on this much controverted subject. In speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said: 'It by no means follows that this can be done by an act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.'"

And there is more in the same opinion to the same effect, which it is not necessary for me to read.

I say to you, gentlemen, so far as anything contained in the rules and regulations for the transportation of live stock, printed at the head of this contract, is concerned, it is not a part of the contract with this plaintiff.

Upon the question of damages in this case, in the event you shall find for the plaintiff (of course if you find that the delay did not cause the injury, that is the end of the case and you find for the defendant. If you find that the plaintiff himself was negligent, that his negligence contributed materially to the loss which he has sustained, that is the end of the case); but if upon these questions you find for plaintiff, you will then

consider the question of damages; in this part of the case you are the judges, but you must consider it carefully. There is no subject coming before courts upon which there is so much extravagant testimony; it is very largely a question of opinion. You must consider all the evidence and all the circumstances, and arrive at a just and reasonable determination. It is not what a man might have made if the horse had not died, by using him as a racer upon the track, that is the test of his damages. The rule is this, that he is entitled to recover the reasonable market value in cash at the place where the loss occurred; that is to say, what the two horses that died could reasonably have been sold for in this market at that time in cash; of course such a question is always subject to more or less uncertainty; one man will estimate it at more than another, and the jury is simply to make use of their common sense, and apply the testimony and all the circumstances, and arrive at a fair and just estimate.

As to the horses that did not die, the damages would be simply the actual loss, the actual damage which the plaintiff sustained by reason of the injuries, the sickness which resulted from the negligence, if there was negligence of the defendant.

In ascertaining the value of these animals, you are to look into all the circumstances, to consider the age of the horses that died; you are to consider their breeding, of course, the purposes for which they might be used, and everything that goes into the question of their market value in this market. As to this old horse, there is a claim here and some evidence tending to show that he was diseased before he left Kentucky, and that is a subject for your consideration. If that be true, it of course affects the value of the animal. It is for you to say whether that is true or not.

I have not gone over the suggestions of counsel, but I think that I have covered everything that is necessary; if there is any suggestion to be made, I will hear it.

Verdict for plaintiff for $750.

In the same case, at an earlier stage of the proceeding,

HALLETT, *District Judge*, in passing upon a demurrer to the petition, said: In the case against the railroad company, the plaintiff alleges that he shipped certain horses over its line and that they were detained on the way, at a place called Brookville, for a space of twenty-four hours, in consequence of which they were sick and two of them died; that he was put to expense in taking care of all of them, and that some of them depreciated in value — those that were not wholly lost. To this the defendant sets up that there was a special contract in relation to the shipment of these horses; but the special contract does not in any way provide for the detention of the stock on the way. It says nothing on that subject, so that, as far as the first defense alleged here is concerned, the contract is not at all pertinent to anything that is alleged in the declaration. The plaintiff, in demurring to it, says that he demurs to so much of the answer as sets up the special contract. We do not receive a demurrer on such a specification as that. The clerk would not know, nor would anybody, what is meant by saying, "we sustain the demurrer to so much of the answer as sets up the special contract."

There are in the answer, however, some things which are in denial of the complaint: as that there was any detention of the horses on the way, that the horses were of the value alleged, and there is a charge of new matter, that the horses were sick before they were taken upon the railroad at all, and that they died in consequence of such sickness. All that is properly in answer to the complaint; and as to what is irrelevant and has nothing to do with the matters alleged in the complaint, if the demurrer could be sustained upon that ground at all, it would have to point out by line and word certain parts, so that we should know where we began, and when we came to the end.

As to the last clause of the answer, which may be taken to be an independent answer in itself, that sets up a provision in the contract, that for injuries to the animals shipped over the line of the road the owner should make a demand in writing

of the agent of the company before removing them from the place of destination or from the place of delivery. It may be that for some injuries this clause in the agreement would be effectual; but here, according to the charge of the complaint, the injury was illness of the animals, which could hardly be discovered until they should be removed from the car; and this clause in the contract would require the parties to hold them there at the depot ground, I suppose, until they could ascertain whether they were in good condition or not. That would be very unreasonable indeed. As to such matters as are charged in the complaint — an illness occurring to animals, the extent of which could not be known until they should be removed from the car, and probably not for some little time after their arrival here — it may be said that this clause in the agreement is of no effect; that the railroad company could not make any such provision in respect to stock shipped over their line. The demurrer will be sustained to the last clause or paragraph, or whatever it may be called, of the answer, and overruled as to the other.

The United States *v.* Berry *et al.*

(District of Colorado. November, 1880.)

1. A Commissioner of a Court is Not a Separate Tribunal — His Functions as an Examining Magistrate Are Only Ministerial, Not Judicial.— A commissioner is but the officer of the court, to whom are committed duties which must otherwise be performed by the court itself. In all he does he is not a seperate tribunal, but an arm of the court to execute preliminary work. As an examining magistrate his functions are ministerial, not judicial.
2. Writ of Prohibition is never employed to control the conduct of a mere officer of the court; but the court may, whenever justice requires it, assume control of proceedings before its commissioner.
3. Question of Jurisdiction — How Raised on Preliminary Examination.— The defendants being before the commissioner of the United States court charged with crime, and the attorney general of the state

having filed his suggestion denying the jurisdiction of the federal government, it is proper for the court to take charge of the investigation, and to this end will direct the commissioner to certify the proceedings.

4. INDIAN TREATIES HAVE FORCE OF LAW — TREATIES WITH INDIANS have the force of law, and when entered into while the reservation is embraced in a territory are not repealed by implication, by the passage of an act authorizing the formation of a state government.
5. JURISDICTION TO PUNISH CRIME COMMITTED IN INDIAN RESERVATION.— Where a district of country has been, by competent authority, set apart as an Indian reservation, and by treaty stipulation the United States have assumed exclusive jurisdiction over it, such district remains an Indian reservation, the federal jurisdiction over it continues until it is changed by act of congress or by treaty, or until the Indian title is extinguished; and this notwithstanding it may be embraced within the limits of a state. This exclusive jurisdiction extends to and embraces the enforcement of the criminal laws.
6. UTE RESERVATION — CONFLICT OF JURISDICTION — THE UTE RESERVATION, though within the state of Colorado, having been set aside as such by treaty, and the exclusive jurisdiction to punish crime therein being by the terms of the treaty vested in the United States, and this treaty not being, in terms, repealed by act of congress, the treaty remains in force as the law; and the United States district court has jurisdiction to try and punish offenders for crimes committed within the reservation.
7. REPEAL BY IMPLICATION.— An express statute conferring special rights and privileges is held never to be repealed by implication unless the intent to effect such repeal is clear.

The defendants being in the custody of the United States marshal, under a warrant issued by a commissioner of the United States circuit court, upon a charge of murder alleged to have been committed on an Indian reservation, the attorney general of the state filed a written suggestion, setting forth that the offense charged, if committed, was within the state of Colorado, and that warrants for the arrest of the accused, on the same charge, had been issued by an officer of the state, which could not be executed because the accused parties were held by the United States authorities for examination before a commissioner of the district court. Claiming for the court exclusive jurisdiction, he moved the court to award a writ of prohibition to prevent the commissioner from proceeding with the examination.

C. W. Wright, Attorney General, for the state.

E. L. Johnson, U. S. District Attorney, for the government.

B. M. Hughes, S. E. Browne, T. M. Patterson, T. Macon, for defendants.

HALLETT, *District Judge.*—Three persons, charged with homicide committed on an Indian reservation, are held by the marshal under a warrant issued by a circuit court commissioner to answer for that crime. It seems that the commissioner assumes jurisdiction to act in the premises on the ground that the place of the alleged crime is within the sole and exclusive jurisdiction of the United States. Denying that proposition and affirming that the place where the crime is said to have been committed is within the criminal jurisdiction of the state, the attorney general of the state suggests to the court that the proceedings of the commissioner are without authority, and he prays that *prohibition* may issue to arrest them in order that the state may proceed against the offenders. In support of the application it is assumed that in making inquiry as to violations of the laws of the United States, a commissioner may be regarded as holding an inferior court, over which this court, having cognizance of the crimes themselves, may have supervisory jurisdiction. But this appears to be founded on an erroneous view of the relations of those officers to this court. For it is plain that commissioners are but officers of the court to whom are committed some of the duties which must otherwise be performed by the court itself, or the judge thereof. The exigencies of the public service demand that speedy inquiry shall be made into all criminal charges, in order that offenders may be brought to justice. And as from the press of business or remoteness from the place where the crime may be committed, or other cause, the court cannot always, or ordinarily, perform that service, commissioners are appointed to facilitate the business. In all that they do they are not separate and independent tribunals,

but the arms of the court to execute the preliminary work of securing the presence of offenders at the time appointed for arraignment and trial. Indeed they are not, and under the constitution they cannot be clothed with judicial power to hear and finally determine any matter whatsoever. Their duties relate only to the detention of the accused, until the charge against him may be formally presented to the court and constitutionally tried. In that they are not bound to hear more than the evidence of the government, and they do not finally determine any question touching the guilt or innocence of the accused. Accordingly, it is said in the books that the function of an examining magistrate is ministerial and not judicial. 1 Bishop's Crim. Proc. sec. 237. And upon this consideration alone the writ of prohibition to control the conduct of a commissioner must be denied. High's Remedies, sec. 769.

But in a broader view of the nature and extent of his office, it will be apparent that a commissioner is an officer of the court merely, as to whom the writ of prohibition is never employed.

It does not, however, follow from this course of reasoning, that the court has no control over the proceedings of a commissioner when acting as an examining magistrate; on the contrary, if in the discharge of such duty a commissioner is an officer of the court, it would seem to be proper in the court to assume control of the proceedings whenever justice may require that it should be done. In important cases it is familiar practice for the judges of superior courts having cognizance of criminal offenses to sit as examining magistrates; and after commitment the proceedings of magistrates are often reviewed on *habeas corpus* and *certiorari*, in the court having cognizance of the crime.

In that way the courts do but assume control in the preliminary stages of matters of which they have the final decision under the law, and no argument can be necessary to support them in a practice which so clearly tends to further the ends

of justice. I do not doubt the authority of the court to take charge of these proceedings, and as the attorney general of the state has come here to deny the jurisdiction of the federal government, that course will be adopted. The commissioner will be directed to certify his proceedings into this court, to the end that we may consider here what may be alleged against them.

The commissioner having certified the papers, pursuant to the foregoing ruling, and the question of jurisdiction having been certified to and heard, in the United States circuit court, by consent, on the nineteenth of November the opinion of the court was delivered, as follows:

McCrary, *Circuit Judge.*— It is alleged that on the twenty-seventh day of September, 1880, the crime of murder was committed within the district of country set apart by treaty of March 2, 1868, between the United States and the several bands of the Ute tribe of Indians (15 Stat. 619), and W. H. Berry and S. N. Hoyt are accused of said crime. The United States claim jurisdiction of the offense on the ground that the murder charged was committed in a place within their exclusive jurisdiction, and in accordance with that claim, the accused have been arrested upon information filed before a commissioner of this court, before whom their cases have been partially examined, and in whose custody they remain, awaiting further proceedings.

The state of Colorado also claims that it has exclusive jurisdiction of the offense charged, upon the ground that the murder was committed within the territorial limits of that state, and in a place within its exclusive jurisdiction; and by an information filed herein by the attorney general of the state, this court is requested to order that the pending proceedings before said commissioner be discontinued, and that the prisoners be turned over to the authorities of the state for trial.

The sole question for our consideration is, was the murder

committed in a place within the exclusive jurisdiction of the United States, for if it was not, the federal jurisdiction cannot be maintained.

Section 5339 of the Revised Statutes of the United States provides that every person who commits murder:

First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States * * * shall suffer death.

Section 711 provides that the jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states, *first*, of all crimes and offenses cognizable under the authority of the United States. * * *

Section 2145, which is found under the title "Indians," provides as follows: "Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States, as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United State, except the District of Columbia, shall extend to the Indian country."

The punishment of the crime of murder is nowhere expressly provided for in said title, and it follows that where that crime is committed in the Indian country, it is within the exclusive jurisdiction of the United States.

The question what territory is included within the term Indian country, as employed in section 2145 above quoted, is one not free from difficulty. The act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the borders," approved June 3, 1834 (4 Stat. at Large, 729), provides that "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, also that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

The Ute reservation of Colorado is not within the territory here described. It was not at the time of the passage of that act a part of the United States, but was subsequently acquired from Mexico. It was originally embraced within the territorial limits of the territory of Utah. 9 Stat. 453.

By section 7 of the act of congress of February 27, 1851 (9 Stat. 587), it is provided "that all the laws now in force, regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby extended over the Indian tribes in the territories of New Mexico and Utah." Whether the effect of this provision was to make New Mexico and Utah, including what is now the Ute reservation of Colorado, Indian country, is to my mind quite doubtful. It is, however, not necessary to decide that question, since it is perfectly clear that by virtue of the treaty-making power, the United States had, prior to the organization and admission into the Union of the state of Colorado, brought the Ute reservation above named within their sole and exclusive jurisdiction, and no doubt whatever is entertained that the federal courts had, prior to the admission of said state of Colorado, complete jurisdiction to hear, try and determine all cases of murder committed within the limits of that reservation. The determination of this case must turn upon the question whether the United States were ousted of their jurisdiction over the said reservation by the provisions of the act entitled "An act to enable the people of Colorado to form a constitution and state government," etc., approved March 3, 1875 (18 Stat. 474). The decision of this question will require the consideration and construction of the said enabling act, in connection with the provisions of the treaty between the United States and the several bands of Ute Indians, proclaimed March 2, 1868. The first section of the enabling act above cited provides "that the inhabitants of the territory of Colorado included in the boundaries hereinafter designated be and they are hereby authorized to form for themselves out of said territory a state

government, with the name of the state of Colorado, which state, when formed, shall be admitted into the Union upon an equal footing with the original states in all respects whatsoever, as hereinafter provided."

The treaty which was in force prior to the passage of said enabling act contains the following provisions:

"ARTICLE 2. The United States agree that the following district of country, to wit: Commencing at that point on the southern boundary line of the territory of Colorado where the meridian of longitude one hundred and seven degrees west from Greenwich crosses the same, running thence north with said meridian to a point fifteen miles due north of where said meridian intersects the fortieth parallel of north latitude, thence due west to the western boundary line of said territory, thence south with said western boundary line of said territory, to the southern boundary line of said territory, thence east with said southern boundary line to the place of beginning, shall be, and the same is hereby set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them — and the United States now solemnly agree that no persons except those herein authorized so to do, and except such officers, agents and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall *ever* be permitted to pass over, settle upon or reside in the territory described in this article, except as herein otherwise provided.

"ARTICLE 6. If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the commissioner of Indian affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and

also reimburse the injured person for the loss sustained. If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black or Indian, subject to the authority of the United States, and at peace therewith, the tribes herein named solemnly agree that they will, on proof made to their agent and notice to him, deliver up the wrongdoer to the United States to be tried and punished according to its laws, and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States.

"ARTICLE 7. * * * The president may at any time order a survey of the reservation, and, when so surveyed, congress shall provide for protecting the rights of such Indian settlers in their improvements, and may fix the character of the title held by each.

"The United States may pass such laws on the subject of alienation and descent of property, and on all subjects connected with the government of the Indians on said reservation, and the internal police thereof, as may be thought proper."

According to a well settled rule of construction, since there is no express repeal of any part of the treaty, that instrument and the statute should be construed together, and as far as possible, the provisions of each should be allowed to stand.

An express law conferring certain special rights and privileges is held never to be repealed by implication, unless the intent to effect such repeal be clear. *State* v. *Brannan*, 3 Zabriskie, 484; *State* v. *Minton*, id. 529. And the doctrine is supported by numerous other authorities.

We are assisted somewhat in the construction of the enabling act, in so far as it bears upon the question now before us, by reference to a subsequent act of congress entitled "An act to further the administration of justice in the state of Colorado," approved June 26, 1876 (19 Stat. 61), which provides,

among other things, "That when the state of Colorado shall be admitted into the Union, according to the provisions of the act entitled 'An act to enable the people of Colorado to form a constitution and state government, and for the admission of said state into the Union on an equal footing with the original states,' approved March 3, 1875, the laws of the United States not locally inapplicable shall have the same force and effect within the state as elsewhere within the United States."

That the treaty above named was a law of the United States is well settled by numerous decisions of the supreme court. *Harkness* v. *Hyde*, 98 U. S. 476; *United States* v. *43 gallons whisky, etc.* 93 U. S. 188; *Worcester* v. *State of Georgia*, 6 Pet. 515; *The Cherokee Tobacco Case*, 11 Wall. 616.

It may be added that congress has recognized the obligation of all treaties with the Indian tribes lawfully made and ratified prior to March 3, 1871. Revised Statutes, 2079. And by numerous legislative provisions, and by many acts of appropriation, congress has recognized all such treaties as having the force of law. See Revised Statutes, sections 2080, 2081, 2093, 2094, 2095, 2096, 2097, 2099, 2100, 2101, 2116, 2118. If I am right in the conclusion that the treaty above named was one of the laws of the United States, which by the terms of the act of congress of June 26, 1876, was to remain in force in said state of Colorado after its admission into the Union, then it follows that the Ute reservation remains within the exclusive jurisdiction of the United States by virtue of said treaty.

But without resting upon this proposition, let us inquire whether the enabling act upon its face ought to be construed as repealing the treaty of March 2, 1868, and as therefore depriving the United States of the power of fulfilling the solemn obligations imposed upon them by said treaty. Among the provisions of said treaty is one which declares that the United States "now solemnly agree that no persons except those herein authorized so to do, and except such officers, agents and employees of the government as may be authorized to enter

upon said Indian reservation in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon or reside in the territory described in this article, except as herein otherwise provided." Article 2.

Another provision of the treaty declares that "if bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent, and forwarded to the commissioner of Indian affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained." Article 6.

The same article further provides for the punishment, according to the laws of the United States, of any person among the Indians who shall commit a wrong or depredation upon the person or property of any one, white, black or Indian, subject to the authority of the United States, and at peace therewith.

Another provision declares that congress shall provide for protecting the rights of Indian settlers, in their improvements, and may fix the character of the title held by each. And still another declares that the United States may pass such laws on the subject of alienation and descent of property, and on subjects connected with the government of the Indians on said reservation, and the internal police thereof, as may be thought proper. All these and many other provisions of the treaty necessarily require for their enforcement that the reservation shall remain under the sole and exclusive jurisdiction of the United States. Indeed, to hold that the jurisdiction of the United States over said reservation is superseded by that of the state, would be to render nugatory nearly every provision of the treaty. When we remember that the policy of keeping the Indian reservations within the exclusive jurisdiction of the national government, until such time as the rights of the Indians therein are extinguished by treaty, has been uniformly

pursued with respect to all the Indian reservations in the country, and is expressed so plainly in the provisions of the treaty above named, it is impossible to suppose that it was the intention of congress by the organization of the state of Colorado to annihilate the treaty, and to deprive the Indians of their right to protection under it. Where a district of country has been by competent authority set apart as an Indian reservation, and by treaty stipulation the United States have assumed exclusive jurisdiction over it, such district remains an Indian reservation, and the federal jurisdiction over it continues, until it is changed by act of congress, or by treaty, or until the Indian title is extinguished, and this, notwithstanding it may be embraced within the limits of a state. *Bates* v. *Clark*, 5 Otto, 204. The treaty by its terms was to be permanent, and the rights conferred thereby were not to be taken away without the consent of the Indians. It may be conceded that it is within the power of congress to repeal it, but it is clear to my mind that such repeal can only be enacted in express terms, or by such language as imports a clear purpose on the part of congress to effect that end.

To hold the treaty abrogated by the subsequent legislation would be to assume that congress intended to depart in this instance altogether from the policy of treating the Indians as wards of the nation, of keeping them and the lands set apart for their use and occupation within the sole jurisdiction of the United States, and that it intended to turn this particular tribe with its reservation over to the jurisdiction and control of the state of Colorado, stripped of its treaty rights, and deprived of the powerful protection of the national government. Such a purpose ought to have been very clearly expressed.

If it be said that the state may have jurisdiction within the limits of the reservation for the purpose of enforcing its criminal laws, without interfering with the rights of the Indians under the treaty, the answer is, that one of the obligations imposed upon the United States by the plain terms of the treaty is, to enforce their own criminal laws against all classes

of offenders within the bounds of the reservation. Furthermore, it is manifest that if the enabling act repeals the treaty for one purpose, it repeals it for all purposes. If the state has jurisdiction over any part of the territory and people of the reservation for the purpose of enforcing its criminal laws, it has jurisdiction over the whole of the territory, and over all the people, whether whites, blacks or Indians. If the jurisdiction now claimed by the state be conceded, then it follows that the state may not only enforce such criminal laws as now exist on its statute books, as against all persons residing or found upon the reservation, but it may enact other laws, if it so wills, in direct conflict with the rights guarantied to the Indians by treaty, as well as destructive of the policy of congress with respect to that people.

This is precisely what the state of Georgia attempted to do in 1829 with respect to the reservation of the Cherokee nation, which was within the limits of that state. But the supreme court of the United States held, in the case of *Worcester* v. *The State of Georgia*, *supra*, that the state legislation was void because in conflict with a treaty with the Cherokee Indians, which was held to be the supreme law of the land. In that celebrated case, Chief Justice Marshall said:

"The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."

An examination of the history of congressional legislation concerning Indian affairs from the formation of the government down to the present time will show a continuous and

consistent policy of national supervision, care and protection. Numerous reservations have been from time to time set apart for their use, and so far as I know, every one of these has been kept within the jurisdiction of the United States, whether located in a territory or in a state, until such time as the Indian title has been extinguished or the tribe has forfeited or voluntarily given up its rights. No case is known to me in which a tribe of Indians with its reservation has been turned over, without its consent, to the jurisdiction of any state. I am unable to believe that congress has in this instance with respect to a single tribe and a particular reservation departed from this policy.

The case of *The Cherokee Tobacco*, 11 Wall. 616, presented, in the opinion of a majority of the judges who took part in the decision, an example of clear and necessary repugnancy between an act of congress and a pre-existing Indian treaty, and therefore one in which the latter repealed the former by necessary implication. The act of congress by express terms extended the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff and cigars, "to such articles produced anywhere *within the exterior boundaries of the United States*, whether the same be within a collection district or not."

The previous treaty with the Cherokee Indians exempted from taxation "any merchandise or manufactured products" of the Cherokees, except such taxes as might "be levied by the United States on the quantity sold outside of the Indian territory." It would seem impossible to reconcile the conflict between the two, since the words "any place within the exterior boundaries of the United States," employed by congress in the statute, manifestly included the Indian territory. And yet the fact that Mr. Justice Bradley and Mr. Justice Davis dissented serves to show the reluctance with which courts yield, even in clear cases, to the doctrine of repeals by implication.

Assuming, however, the soundness of the opinion of the

majority in that case (as we are of course bound to do), let us consider whether it applies to the case now in hand. To make the two cases parallel, it would be necessary to show that congress, in the Colorado enabling act, expressly declared that jurisdiction of the state of Colorado for the purpose of enforcing its criminal laws shall extend to all the territory within the exterior boundaries of said state. Such language would, according to the doctrine of the case just cited, have repealed by necessary implication so much of the pre-existing treaty as placed the Ute reservation within the jurisdiction of the United States. But no such language is employed by congress in the enabling act. Nothing is said about the jurisdiction of the state over the territory within its boundaries. The people of the territory were to form for themselves a state government, which was to be admitted into the Union on an equal footing with the original states. Does it necessarily and invariably follow from this language that the state should exercise jurisdiction over every foot of territory within its boundaries? I think not. The language is general, and is not necessarily in conflict with an exception in a special case created by some previous law.

Suppose, for example, that the United States had, prior to the admission of the state, reserved for its own use for military purposes a portion of the territory embraced within the limits of the state as subsequently organized, and that the same had been set apart by law for that purpose. Will it be contended that such a reservation would have passed by virtue of the general terms of the enabling act into the exclusive jurisdiction of the state? If not, we see at once that the general language of the enabling act may admit of some exceptional special cases. Its language is broad and comprehensive, and is sufficient to confer jurisdiction upon the state government over all its territory, unless by express enactment jurisdiction over some part of that territory, for some special purpose, had been previously retained by or vested in the United States. There is probably no state in the Union which

does not contain more or less territory which is within the sole and exclusive jurisdiction of the United States. Lands held for military or naval purposes, or for the use of the post office, or for the courts, as well as such as are held for Indian reservations, are examples. Where such lands are taken after the formation of a state government, it has generally been deemed necessary, or at least expedient, to obtain from the state a relinquishment of jurisdiction; but where jurisdiction over them is vested in the United States, prior to the organization of the state government, this is not necessary.

My conclusion is, that the treaty of March 2, 1868, remains in full force, and has not been repealed; that by virtue of its terms the Ute reservation is within the jurisdiction of the United States, and that the federal courts of this district have jurisdiction of the case stated in the information.

The order prayed is accordingly denied.

HALLETT, *District Judge*, concurs.

THE FIRST NATIONAL BANK *v.* BISSELL, FOSS & HUNTER.

(District of Colorado. June, 1880.)

1. PURCHASE BY ONE PARTY TO AN AGREEMENT TO MAKE JOINT PURCHASE IS FOR JOINT BENEFIT OF ALL.—If two or more persons agree among themselves to purchase property for their joint account, and the purchase is accordingly made by one or more of them on behalf of all, the liability of each to pay his share of the purchase money, and his right to an interest in the property, cannot be controverted. So, also, if two or more persons enter into a contract with another to purchase property, all matters being fully arranged in the agreement, the equal right of all vendees to proceed in the execution of the contract may be conceded. But neither one of the vendees under such contract could take the title to himself, until default by the party excluded, in some manner to which he was bound by the terms of the agreement.
2. PURCHASE AS TRUSTEE — WHEN HELD TO BE.— If one take unto himself a title which he has purchased with the money of another, he is a trustee for the true owner, who may rightfully follow the fund, wherever it may be miscarried.

3. AN AGREEMENT TO NEGOTIATE FOR PURCHASE OF PROPERTY GIVES NO RIGHT TO EITHER PARTY THERETO.—An agreement between A and B to purchase the property of C—the latter not being a party thereto—amounts simply to an agreement to negotiate with C for the property, and presents no feature which can affect the title. Such an agreement could give no right to either party until consummated in the purchase of the property.
4. AN AGENT TO PURCHASE A PARTICULAR PROPERTY FOR ANOTHER MAY REPUDIATE HIS AGENCY AND PURCHASE FOR HIMSELF.—The case is not different if A and B be regarded as agreeing to an agency in respect to the purchase of the property. For if one who is clearly an agent for another to purchase property, repudiate the agency and act for himself, using his own funds, he cannot be declared a trustee for his principal, although the latter may have been misled by the conduct of the former.
5. TENANTS IN COMMON ARE BOUND TO PROTECT THE COMMON TITLE, BUT MAY DEAL WITH EACH OTHER THE SAME AS WITH STRANGERS, TOUCHING THEIR RESPECTIVE INTERESTS.—Although tenants in common are not at liberty to assail the common title by which all hold, they may deal with each other touching their respective interests, and are at liberty to purchase from each other, the same as a stranger might purchase from any or all of them. The purchase by one co-tenant of the interest of another will not inure to the benefit of all who retain an interest in the property.
6. INDIVIDUAL ACTION OF MEMBER OF A PARTNERSHIP.—Fidelity to the partnership is the highest duty of its members, and no member can be allowed to turn the partnership concerns to his own account; and whenever a member is found to be seeking a private advantage from partnership dealings, the courts are prompt to correct such an abuse of confidence. To invoke this principle, however, it is necessary to show that the malversation was of partnership funds or effects, otherwise no member of the partnership can complain.
7. THE RULE IN MINING PARTNERSHIPS.—In mining partnerships, the firm has no right of pre-emption as to the interests of retiring parties, especially when the parties are tenants in common of the mines, themselves, and not merely partners in the business of mining. In such an association it cannot be said that there is, in the collective body, a right to acquire new interests which its members are bound to respect. Each member holds his interest in his own right, with power to dispose of it as he thinks proper, and is free to deal with an associate, or with a stranger in respect to such interest. And each member is at liberty to buy from his associates and thus enlarge his interest in the whole property, without reference to the partnership relation—and such purchase will not inure to the benefit of other joint owners.

L. C. Rockwell, for plaintiff.

W. S. Decker and *D. P. Dyer*, for defendants.

HALLETT, *District Judge.*—In the month of September, 1878, Charles R. Bissell, Simon H. Foss and Absalom V. Hunter owned in equal parts three-fourths of the Winnemuc mine, and three-fourths of seven-sixteenths of the New Discovery mine, near Leadville in this state. The remaining one-fourth interest in the same property was owned by Edward Handley, George W. Robertson and Amos B. Rawlings, and all were engaged in working the mines, which were very productive. In their relations to each other as owners of the property, the parties named were tenants in common; and in respect to their operations in working and mining on the property, they were mining partners. As to their partnership relation, nothing more is shown than the fact that they were working the mines and sharing in the proceeds according to their respective interests, so that the relations of the parties were not the subject of express contract, and must be ascertained from their ownership of the property and their conduct in working it. In the month of September, 1878, the parties were greatly harassed by adverse claimants of the property, and Handley, Robertson and Rawlings became anxious to dispose of their interest. The Winnemuc property was known to be valuable, having yielded about $40,000, which was paid for the seven-sixteenths interest in the New Discovery in this month of September. There was also in bank to the credit of the company something like $16,000, one-fourth of which belonged to the Handley party. Bissell and Foss, who were on the ground, were anxious to purchase the interest so offered, not solely on account of its intrinsic value, but also to prevent adverse claimants from acquiring an interest in their title, and thus securing a foothold on their side. So anxious were they, that they agreed to decry the property as much as possible, and to magnify the dangers besetting it, in order to increase

the alarm of the Handley party, and induce them to sell at a low price. The subject of the purchase became a matter of consultation and conference between Bissell and Foss, and they agreed as to the propriety of making it, if the property could be had at a reasonable price. But it does not appear that there was any definite understanding as to what sum should be paid for it, or where the money for that purpose should be obtained. Whether the money in bank to the credit of the company was available for that purpose, or had been pledged to persons who had entered themselves as surety in certain attachment suits which had been brought against the company, has become a subject of controversy in the record. Probably it was a part of the plan to represent to the Handley party that the money in bank was so pledged in order to induce them to sell at a low price. To propose to pay for the property out of the company's funds would have opened the eyes of the Handley party to the nature of the transaction, if anything could produce that result. Hence the necessity for some pretense that the money was not then in the command of the parties, and that, like the property, it was beset with dangers of which no man could then form a just estimate. However this may be, there was no understanding that this fund should be used in the purchase of the property, nor was there any agreement as to how the money should be raised for that purpose. As the result of the several interviews between Bissell and Foss on the subject of the purchase, it may be said that they were united in a purpose to get the Handley interest for partnership account, if it could be obtained at a cost of $30,000 or less, but nothing was done towards raising the money. With this end in view, negotiation took place with members of the Handley party, but nothing was accomplished until a few days later when Hunter arrived at Leadville. Whether Hunter was then advised of what had taken place between Bissell and Foss, and the Handley party, we are not informed, but upon his arrival a new arrangement was made between himself and Foss for obtaining the Handley interest, and apparently without the

knowledge of Bissell. This was, in substance, that Hunter was to assume to sell to Foss his one-fourth interest in the property for $15,000, in order to induce the Handley party to sell their one-fourth interest at the same price. And Hunter was to furnish the money for the Handley interest, and to have two-thirds of that one-fourth, or two-twelfths of the whole, the remainder of that one-fourth, or one-twelfth of the whole, to go to Foss. This trick was successful, and Foss was made the grantee of one-half interest in the property from Hunter, Handley, Robertson and Rawlings, of which he a few days later reconveyed five-twelfths to Hunter. In this performance Handley, Robertson and Rawlings received $300 from Foss, and $14,700 from Hunter, who pretended to act in that matter as the agent of Foss, but really furnished the money himself. Before the transaction was fully completed by the payment of the money, and probably on the day the deed was made and before it was delivered, Bissell was advised of it, and at once asserted his right to an equal share in the property with Hunter and Foss, and expressed his willingness to pay his part of the purchase money. That claim was denied, and the property having been sold and the proceeds deposited in the First National Bank of Denver, this suit was brought by Foss and Hunter against Bissell and the bank to determine the right to the fund. The bank was dissatisfied with its position in the suit, and filed its cross-bill to compel the others to interplead and adjust their differences, and exonerate the bank from liability. Issue was joined on that bill, but the contestants have not acceded to its prayer otherwise than by the original pleadings. No question is now made, however, as to the form of the issue, and none will be considered by the court.

The matter in controversy is whether upon what took place in the purchase of the Handley interest in the mines, Bissell is in equity to be regarded as a party thereto. Out of the relations of the parties as mining partners and tenants in common, or joint tenants of the three-fourths interest in the

property, as well as from the conference and agreement between Foss and Bissell in respect to the purchase of the Handley interest, it is contended that a duty arose on the part of Foss towards his associates which was violated by him in making the purchase for Hunter and himself only. In other words, the position is assumed that relations of trust and confidence existed between the parties by which the acts of each relating to the common property should be controlled, and whatever was done by any of the owners should be taken to be for the advantage of all; or that Bissell was too confiding and was overreached by Foss, who, while claiming to act for all, sought to appropriate the purchase to Hunter and himself. Familiar principles are invoked in support of this position, and we shall best ascertain how far they may be applicable to the case by considering them with reference to the attitude of the parties in the several positions in which we find them in the record. And first let us put out of view their association as mining partners and tenants in common, and consider whether by the conference and agreement to purchase the property between Foss and Bissell, anything was established upon which the claim of the latter may rest. If two or more persons agree amongst themselves to purchase property for their joint account, and the purchase is accordingly made by one or more of them on behalf of all, the liability of each to pay his share of the purchase money, and his right to an interest in the property, cannot be controverted. So also, if two or more persons enter into a contract with another to purchase property, all matters being fully arranged in the agreement, the equal right of all vendees to proceed in the execution of the contract may be conceded. To illustrate that proposition, if the Handley party had agreed with Bissell, Foss and Hunter to sell to them their interest in the mines, no one of the vendees could have taken the title to himself under that contract until default by the party excluded in some matter to which he was bound by the terms of the agreement. Again, if one take unto himself a title which he has purchased with the

money of another, he shall be a trustee for the true owner, who may rightfully follow his fund however it may be miscarried. But the record presents no one or more of these facts. There was indeed an agreement between Foss and Bissell to purchase the Handley interest, if that may be called an agreement which lacks the essential features of a price for the property and money to pay for it. But Handley, Robertson and Rawlings were not parties to that agreement, and therefore it was not in itself an agreement to purchase, but to negotiate with them for the property. In that form it presents no feature which can affect the title to the property. At most it was an agreement between intending purchasers which could give no right to either until it should be consummated in the purchase of the property. If we regard Foss and Bissell as agreeing to an agency in respect to the purchase of the property, the case is not different. For if one who is clearly an agent of another to purchase property, repudiate the agency and act for himself, using his own funds, he cannot be declared a trustee for his principal. *Burden* v. *Sheridan*, 36 Iowa, 125. A different rule appears to be laid down in Story's Eq. Jur. sec. 1211 *a*, but its limitation will be found in another section of the same volume, sec. 1201 *a*.

An attempt was made in argument at the bar to put this case upon the footing of a numerous class in the books in which real property was granted upon a parol pledge from the grantee to make some disposition of it; as where a son has been granted an estate upon condition that he will support his father during his lifetime, or where a devisee has promised the testator to divide the estate with another. In all such cases the trust may be established by parol, and the trust itself stands on the plainest principles of justice. But to point out the distinction between those cases and the case under consideration can hardly be necessary. Foss received nothing from Bissell on account of the purchase of the property, nor did he take the property with the understanding that he should admit Bissell to an interest in it. If he had received the property

upon a pledge to hold it for Bissell, or to make some other disposition of it, his failure to do so would be a fraud upon the grantors as well as the beneficiary, of which either might complain, and the principle invoked would be applicable. But here there was nothing of that kind. The property was sold to Foss, who in fact received it, and Bissell comes to complain that he was not admitted to the purchase as by his agreement with Foss he should have been. However he may have been misled by the conduct of Foss he was not in fact a purchaser, and Foss did not receive the property to his use in any way, and therefore he acquired no interest in it.

If now we turn to the co-tenancy of the parties we find in that relation nothing of weight respecting the question under consideration. For although tenants in common are not at liberty to assail the common title by which they all hold, they may deal with each other touching their respective interests. Freeman's Co-tenancy, 165. While Bissell, Foss and Hunter, and the Handley party were all bound to maintain the common title, each was at liberty to purchase from the other in the same manner as a stranger might purchase from any or all of them. *Alexander* v. *Kennedy*, 3 Grant's Cases, 380. It has never been claimed that a purchase by one co-tenant of the interest of another would inure to the benefit of all who should retain their interest, and certainly there is nothing in the relations of such owners to support that doctrine.

The limitations to individual action on the part of the members of a partnership in respect to those matters which may or may not be within the scope of the partnership business, are, in many cases, not easily defined. We know, however, that fidelity to the partnership is the highest duty of its members, and that no member can be allowed to turn the partnership concerns to his own account. And whenever a member is found to be seeking a private advantage from partnership dealings, the courts are prompt to correct such an abuse of the confidence reposed in him by his associates. A familiar application of the principle is found in the cases cited

by counsel, in which it is held that a partner cannot in his own name renew the lease of the premises used by the firm. In New York, the doctrine was applied to a case in which the renewal did not begin until the copartnership had expired by its own limitation, and the reasons assigned by the court are entirely satisfactory. *Mitchell* v. *Reed*, 61 N. Y. 123. The position assumed in these cases is that the renewal is auxilary to the original lease, and so far connected with it that it shall be regarded as a part of it; and as the original lease was owned by the firm, any attempt by a member to appropriate the renewal to his own use is a direct conversion of the property of the firm. In other words, the doctrine is that a member of a firm shall not be permitted to take unto himself the property of the firm, and the renewal of the lease whereof the firm holds the original is such property, and therefore it is protected for the use of the firm. To invoke the principle, however, it is obviously necessary to show that the malversation was of the partnership funds or effects, for if it be otherwise no member of the partnership can complain.

And this brings us to inquire, what right or interest of the copartnership of which he was a member was used or asserted by Foss in making the purchase of his associates' interest in the mines? Is it true that in a mining partnership the firm has a right of pre-emption as to the interests of retiring partners in the mines? The answer is not doubtful. Where the partnership is formed expressly to work mines, and the mines are held by lease, the lease and renewal of it is, as the courts have held, partnership property. But in the case at bar, the partnership arose out of a community of ownership in the mines, and the parties were in a very large sense involuntary associates. They came together upon the ground that they were tenants in common of the mines and not upon any agreement to engage in the business of mining. Indeed, they had no agreement whatever respecting their joint operations, but they stood solely on their ownership of the property, in consideration of which they united for the purpose of

working it. They were partners in the working, but not in the ownership of the mines, and their firm was a thing of the hour without hope of existence. In that kind of association it cannot be said that there is in the collective body a right to acquire new interests which its members are bound to respect. The object of the partnership was to take out ore, and in all things directed to that end, each member owed allegiance to the company. Beyond that, they were entirely free to act touching their interests in the mines, as well as other individual property. Each member held his interest in the mines in his own right, with power to dispose of it as he should think proper, and each was free to deal with his associate or with a stranger in respect to such interest. So also each member was at liberty to buy from his associates, and thus enlarge his interest in the whole property without reference to the partnership relation. On the whole case no reason can be found for saying that the purchase of the Handley interest inured to the benefit of Bissell, or that he had any share in it. If, in making it, Foss violated his promise to Bissell, in that there was moral wrong, and possibly there may be some remedy for the breach. But it cannot be said that by such promise only, Bissell, who furnished no part of the purchase money, acquired an interest in the mines.

The money will be awarded to Foss and Hunter.

MASON *et al. v.* COTTON *et al.*

(District of Colorado. November, 1880.)

1. RIPARIAN RIGHTS.—Each riparian owner has the right, within his territory, to the use of the water as it flows — returning it to the channel of the river for the use of those below.
2. REMEDY FOR VIOLATION OF RIPARIAN RIGHTS.—The remedy for the violation of the riparian rights is by action at law; and while equity may take cognizance of the violation of these rights when conceded and estab-

lished, it will not aid one who, out of mere captiousness, refuses to use water after it has been diverted from the stream by another, if he may so use it with substantially the same results as if obtained by continuous flow from the stream through his own race.

Wells, Smith & Macon, for complainants.

H. M. & W. Teller, Haynes, Dunning & Haynes, for respondents.

Upon motion to dissolve injunction. The facts appear in the opinion.

HALLETT, *District Judge.*— Plaintiffs own a flouring mill, situated near Fort Collins, in this state, which is operated by water obtained from the Cache-a-la-Poudre river, through a race about one mile and one-fourth in length. This mill and race have been used by plaintiffs and their grantors since 1872. In the summer of 1879 the Fort Collins Water Power Company, one of the defendants, made another race or canal, parallel in its general course to that used by plaintiffs, and above the latter, so as to take water from the Cache-a-la-Poudre river at a point about one-fourth of a mile above the head of plaintiffs' race. In the same year, one Joseph P. Watson having obtained water power from the Fort Collins Co., erected a flouring mill on the line of that company's canal, about one-half mile above plaintiffs' mill, and fifty yards from plaintiffs' race. Obtaining power from a point on the river above the head of plaintiffs' race, the position of Watson's mill is such that the waters used in operating it may be delivered into plaintiffs' race, and flow thence down to plaintiffs' mill.

When the Watson mill was completed and set in operation in September, 1879, this was done by agreement between Watson and plaintiffs, and both mills were run with the same water through the autumn of that year, and until business was suspended by plaintiffs in the early part of this year. It is said, however, that this use of the same water by both parties was

attended with much difficulty in operating plaintiffs' mill, as the water came to them irregularly and not in sufficient quantity to run the mill. Accordingly plaintiffs revoked the permission they had given to Watson to deliver his water into their own race, and insisted upon their right to take water from the river through their race, as they enjoyed it before the Fort Collins canal was taken out, and before the Watson mill was built. In the early part of this year defendant Carter-Cotton purchased the Watson mill, and soon thereafter, in compliance with plaintiffs' demand, changed his tail-race so as to carry the water from his mill to the river *under* plaintiffs' race. It will be remembered that by some understanding or agreement between plaintiffs and Watson, the water from this mill was before that time delivered into plaintiffs' race, with a view to run plaintiffs' mill with the same water, and by this change such use was entirely abandoned. In August last, it was found that the waters of the river were not sufficient to supply the races of both mills, and the defendant Carter-Cotton, continuing to divert the same for the use of his mill, this bill was filed by plaintiffs in the district court of Larimer county, on the first of September, to restrain such diversion. An injunction was allowed in that court, and subsequently much testimony was taken by a referee before the case was removed into this court; and upon that evidence and the pleadings the present motion to dissolve the injunction is founded.

Upon all the evidence it may be said that there is not at all times in the river sufficient water to run both mills, unless the same water can be used for both of them. Such was the condition of the river when the bill was filed, and it seems that it was in the same condition during last winter. And the right of plaintiffs to take water from the river through their race, as they and their grantors have done for many years, is not denied; so that it may be assumed that at the head of their race, and thence down to their mill, they are entitled to the use of the water as riparian owners. Defendants may have the same right at the point where they take the water from

the river, and thence down to the head of plaintiffs' race, where, upon familiar principles, they are bound to return the water to the channel of the river for plaintiffs' use. Conceding, then, plaintiffs' right to divert the water and use it as claimed, defendant Carter-Cotton cannot assert a right to the use of it lower down the river, and within the territory already conceded to plaintiffs. For each riparian owner has right, within his own territory, to the use of the water as it flows, returning it to the channel of the river for the use of others below; and at the point where defendants' mill is located, that right is apparently in the plaintiffs. Manifestly, then, the defense to this suit, if any exists, is to be found in the circumstance, if it can be established, that the same water may be used for both mills, without serious detriment or hinderance to either. And that will not be an absolute and full defense; because, as before stated, the right of the plaintiffs in the use of the water as they have hitherto enjoyed it appears to be clear. But if it is seen that the water may be conveniently used by both parties, a court of equity may withhold its hand, leaving the parties to the remedies afforded by law. The river not having sufficient water for both mills, independent of each other, if plaintiffs may use the water after it has passed from defendants' mill with substantially the same results as if obtained by continuous flow through their own race, the refusal so to use it would be mere captiousness, in which the court ought not to aid them. In this view the evidence has been carefully examined to determine the fact, whether plaintiffs may use the water delivered into their race out of defendants' mill, as well as if otherwise obtained. And although the evidence is strongly conflicting and not of the most satisfactory kind, it seems reasonable to believe that the water may be used by both parties. Witnesses testify that with apparatus well known and already applied in defendants' mill, the water may be sent out to plaintiffs' race in even and continuous flow; and if so transmitted, the use of it one-half mile below would seem to be free from difficulty. Some tes-

timony is given to show that the water was at times last winter shut off by Watson, to gain a head for his mill, and no doubt is entertained as to the injury to plaintiffs by such conduct. But if those acts of his grantors can be imputed to Carter-Cotton, the present defendant, it does not follow that the present defendant is now inclined to the same course; or, that he will persist in it when informed that he has no right to proceed in that manner. The question for present consideration is larger and broader than that which may arise from the *manner* of using the water by defendant, and relates to *any use of it* by him during a great part of the year. To maintain this injunction would deny the right of the defendant to *any use* of the water, when the volume of the stream is not sufficient for both mills, and when possibly the water may be used by both mills with equal advantage. It is true that we have no right here to impose upon the plaintiffs the terms which the defendant asks to establish, that they shall take water from his tail-race. But we can deny to plaintiffs relief in equity, leaving them to their action at law, in which all the circumstances may be considered in coming at the measure of damages. If plaintiffs captiously refuse to receive water in a way which may be as useful to them as if it should be brought from the river through their own race, the jury will know what estimate to put upon their conduct. If defendant, by shutting off the water entirely, prevents the flow to plaintiffs' mill, the jury will be equally prepared to redress the wrong. And when the rights of the parties have been determined at law, if either party shall persist in flagrant violation of such adjustment, equity may come to the relief of the other, with a better understanding of what needs to be done. This injunction will be dissolved, but the bill may stand if plaintiffs conceive that it may be of use to them hereafter.

Miller v. The Union Pacific Railway Company.

(District of Colorado. November, 1880.)

1. Pleading — Insufficient Statements in Petition — Demurrer.— In an action for damages for injuries to the person, by a carpenter employed by a railway company, the allegation in the petition that the injury was received while riding on a "*push-car or hand-car*" is not sufficient. Such petition is defective for uncertainty, and a demurrer to it will be sustained.
2. Necessary Averments.— In order to recover, the plaintiff must allege that cars such as he was riding in when injured are usually supplied with brakes, or other apparatus for controlling its movements.
3. Contributory Negligence.— It is negligence in an employee of a railway to ride down grade on a push-car, which he knew to be unsupplied with brakes; and for an injury received in such case he cannot recover.

Geo. H. Gray and *T. A. Green*, for plaintiff.

H. M. & Willard Teller, for defendants.

On demurrer to petition.

The facts appear in the opinion.

McCrary, *Circuit Judge (orally).*— This is a case in which the plaintiff sues to recover damages for an injury received while riding on what he calls in his petition a "push-car or hand-car." It is alleged that he was employed as a carpenter for the defendant company, and was furnished with a car to carry his tools and transport himself from the station on the main line along a side track or branch road to a coal station; that he went up on this car. It is not stated in the petition whether he pushed it up or whether he rode upon it and somebody else pushed it; but it is alleged that when he came to return he and several others got aboard the car and started down the track, which was of a very steep grade, and the car got beyond their control, having no means of retarding its movement, and in jumping out of it he was injured.

The demurrer to the petition is upon the ground that plaintiff's statement of the case in the pleadings shows that he was guilty of contributory negligence. In the courts of the United States, at least, and I think in most if not all the states, the defense of contributory negligence is a good defense in a case of this kind.

In the first place, this petition is defective for uncertainty. It says that it was "a hand or push-car." It is necessary that the plaintiff should describe the car with more particularity than that, because a hand-car may be one thing and a push-car quite another, and it is impossible to determine the question of contributory negligence without knowing something about the character and construction of the car; because of course it is a very material question whether there was any apparatus on the car itself which could be used by persons riding upon it to stop it or to retard its movement. If it was what is known as a push-car, and if those cars are used ordinarily merely for carrying something, being propelled by some one walking by them and pushing, and if it had no brakes or apparatus for stopping or retarding its movements, then it was negligence to get aboard of it and start down grade without any means of controlling it. I say then, in the first place, the petition ought to describe the car. To say it was a hand or push-car is not enough.

In the second place, if the car on which plaintiff was riding when injured was known as a push-car, and had no brakes or apparatus for controlling its movements, and if the plaintiff knowing this got on the car and rode down the grade, this was negligence, and the plaintiff cannot recover. The petition does not show very clearly, to say the least, whether the car was without brakes or not. But I apprehend, from what counsel have said, that it had no brakes.

Another proposition is this: In order to recover, plaintiff must allege that cars such as the one he was riding in when injured are usually supplied with brakes. Of course he cannot recover, unless it appears that he went aboard of this car,

supposing that there was some mode or way by which persons, when traveling on it or riding in it, could retard its movement or stop it. If he knew from having ridden in the car, or having seen others push it as he came up the track, that it could be controlled only by walking along by it and holding it back, and knowing that, he got into it with a number of other people to ride on a down grade, he took his chances. It was a clear case of contributory negligence.

The demurrer for these reasons is sustained. If the counsel for plaintiff thinks that he can make a case, he may amend.

MOONEY *v.* AGNEW.

(District of Colorado. June, 1880.)

1. REMOVAL OF CAUSE.—Application for removal of a cause from a state to a federal court on the ground of citizenship must be made before the trial of the cause.
2. SAME—PART OF THE DEFENDANTS CANNOT REMOVE.—When judgment has been rendered against some of the defendants and an appeal has been taken to the supreme court of the state, an application on part of the other defendants for a removal will not be granted. The controversy is an entire thing, and it cannot be removed at all unless it be removed as to all.

HALLETT, *District Judge (orally).*—A motion was made some days ago to remand this cause to the district court of Arapahoe county from whence it was removed. It appears that the action was brought against some twenty or more defendants, two of whom were served with process, and judgment rendered against them at the last term of the district court of Arapahoe county. These defendants appealed the cause to the supreme court of the state. Soon afterwards two other defendants were served, and they, upon certain petitions, removed the case into this court. The petitions show that all the defendants, as well those against whom judgment was rendered as those making the application, and those who have

not been served in the cause, are residents of other states, that is, not residents of Colorado; and the plaintiff is a resident or citizen of this state, so that as to the citizenship of the parties, the plaintiff is a citizen of this state, and the defendants are citizens of other states, and upon that it would seem to be a controversy between citizens of different states, all of the defendants differing in their citizenship from the plaintiff; and it would seem, also, that the application for removal to this court is made under the last clause of section two of the act of 1875. That clause is that, in any suit mentioned in the section, if there shall be a controversy which is wholly between citizens of different states, that can be fully determined as between them, then one or more of the plaintiffs or defendants actually interested in such controversy may remove the cause to the circuit court; that is, all the defendants being citizens of states other than that of which the plaintiff is a citizen, the application may be made by one or more of them; and upon such application, if the cause is in condition to be removed, the removal may be had without the concurrence of others of the defendants.

But there seems to be a difficulty as to the condition of the case. As stated before, judgment has been rendered as to two of the defendants, and they have taken an appeal to the supreme court of the state. As to them, the cause is not in a condition for removal, because it has passed to an appellate tribunal, and the rule is that the removal must be had before the trial of the cause. As to the other defendants in the cause,— those who have been served and made this application for removal, and those who have not been served,— the cause is in a condition for removal. But the controversy which is mentioned in this section is regarded by the court as an entire thing,— that is to say, the controversy is between the plaintiff and all these defendants,— and it stands now in this attitude: that the controversy as to two of the defendants is pending in the supreme court of the state, and as to the others, in the district court of the state, and it cannot be removed at all un-

less it be removed as to all. We must have the whole of it if we are to have any; and because as to two of the defendants it is not removable, for that reason it is not removable as to any. We have heretofore held that in a cause in which judgment has been rendered against some of the defendants and no appeal taken by those defendants from the judgment, that as to those defendants the controversy is ended; and so far as it is still an existing controversy standing between the plaintiff and those who still contest the right of the plaintiff, it may be removed into this court. But that is not the position of this case. The controversy is still going on, still waged between the plaintiff and the defendants against whom judgment has been taken, as well as against those against whom no judgment has been taken.

If we consider further the attitude of the case in the state court, and the position of these parties who have been brought in, the reason for this conclusion will be more apparent. This writ which has been issued is in the nature of a writ of *scire facias*, and it is to make the other parties, the persons served, parties to the judgment which has been rendered against the two defendants, and from which an appeal has been taken. If it should result in the supreme court of the state that this judgment should be reversed, there would be no ground of proceeding against these parties who are now served, because they are to be made parties to the judgment which is already of record in the district court of the state. If that judgment should be removed by the action of the supreme court of the state, there would be no basis for proceeding against these defendants. This proceeding stands upon the theory that there is a judgment in the district court of the state to which these persons are to be made parties, and if that judgment should be reversed or set aside, there could be no proceeding against them. Of course we cannot be put in the position of having a suit here which will be subject to the contingency of reversal of the judgment of the district court of the state.

The cause will be remanded according to the motion.

St. Louis National Bank *v.* Allen.

(District of Iowa. January, 1881.)

1. National Bank Right to Sue in Federal Courts.— A bank organized under the national banking law is not authorized to sue outside of the district in which it is located, in a circuit court of the United States, independently of any question of citizenship.
2. Same — Jurisdiction — Citizenship.— For the purposes of the jurisdiction of the federal courts, a national bank is to be regarded as a citizen of the state in which it is established or located.

Hagerman, McCrary & Hagerman, for plaintiff.

John N. Rogers, for defendants.

McCrary, *Circuit Judge.*— The demurrer to the declaration in this case raises the question whether a national bank, organized under the act of congress of June 3, 1864 (13 Stat. 12), and located in St. Louis, Mo., is authorized to sue in this court a citizen of this state. In the discussion of the demurrer two questions have been suggested: 1. Whether a national bank is authorized to sue in any circuit court of the United States independently of any question of citizenship? and 2. Whether for the purposes of jurisdiction a national bank is to be regarded as a citizen of the state in which it is established or located?

1. Although upon the first question there may be room for doubt, we are inclined to answer it in the negative. The language of the statute is, that national banks shall have power "to sue and be sued, complain and defend in any court of law or equity as fully as natural persons." A fair construction of this provision would seem to go no further than to place these corporations on an equal footing with natural persons, and to confer upon them the right to sue and be sued in the federal courts only to the same extent as natural persons, and under like circumstances and conditions. The first charter of the United States Bank, enacted in 1791 (1 Stat. 191), contained a

provision which empowered the bank "to sue and be sued, etc., in any court of record or any other place whatsoever." This language is more comprehensive than the corresponding clause above quoted from the present banking act, for it does not contain the words "as fully as natural persons," and yet it was construed by the supreme court as not broad enough to authorize suit by a bank in a circuit court of the United States. *United States* v. *Devaugh*, 5 Cr. 85. In that case the court held that the general words employed in the act gave only a general capacity to sue, and not a particular privilege to sue in the courts of the United States. It was probably in view of this decision that congress in the second bank charter, enacted in 1816 (3 Stat. 101), provided expressly that the bank should have power to sue and be sued "in all courts having competent jurisdiction, and in any circuit court of the United States." Upon the first question, therefore, our conclusion is that, as the right of a national bank to sue in this court is assimilated to the right of a natural person under the statutes to do so, it is a right which can be maintained only upon the ground of citizenship, since that is the test which must be applied to natural persons.

2. Can the plaintiff, a national bank, sue as a citizen of Missouri? By a long course of adjudications by the supreme court of the United States, it has been settled that a state corporation is, for jurisdictional purposes, to be regarded as a citizen of the state by whose laws it is created. These adjudications are, however, for the most part not placed upon the ground that a corporation can in any proper sense be a citizen within the meaning of that term as employed by the constitution. On the contrary, it is repeatedly declared that a corporation cannot possess the attributes of citizenship, and the rule is upheld upon the ground that a suit brought by or against a corporation is regarded as a suit brought by or against the stockholders of the corporation; and for the purpose of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the state which, by its laws, created the

corporation. *Insurance Co.* v. *French*, 18 How. 404; *Muller* v. *Dows*, 95 U. S. 444; *Covington Drawbridge Co.* v. *Shepherd*, 2 How. 233.

The question for our consideration in this case is, does this rule apply to a national bank, created by act of congress, but located and established within a particular state? It is clear that a corporation acquires no attribute of citizenship by being organized under or created by a state law, that it would not possess if created by a law of the United States. The difficulties in the way of permitting corporations to sue in the federal courts on the ground of citizenship apply with the same force whether a corporation derives its existence from a state or a national law. These difficulties have been overcome with respect to state corporations, by adopting an arbitrary presumption as to the citizenship of the stockholders — a presumption no doubt often contrary to the fact, but justified in the opinion of the supreme court by considerations of great public importance. These considerations apply alike to all corporations located and doing business within a state, whether chartered under state or federal authority. The policy of the adjudications referred to is to treat corporations as citizens of the state in which they are located; the circumstance that they derive their existence from a state law makes no difference. If they are created by an act of congress and located within a state, they become within the reason of the rule citizens of the state as much as state corporations. In delivering the opinion of the supreme court in Letson's case (the leading case upon this subject), Mr. Justice Wayne said: "When a corporation exercises its powers in the state which chartered it, that is its residence." 2 How. 497. An examination of the national bank act will clearly show that national banks are in most respects, purely local institutions. They are distributed among the states and territories with due regard to their several wants, and by a fixed rule of apportionment. It is provided by the 6th section of the act of 1864, that the organization certificate of

every national bank "shall specify the place where the operations of discount and deposit of the association are to be carried on, designating the state, territory or district, and also the particular county and city, town or village." Numerous other provisions of the act refer to the associations to be organized under it as "located" within the states. They are also made subject to taxation under state law. It is far from correct to say that because they are organized under a law of the United States, they possess the same and equal rights in all the states. They must carry on their business of banking at the place named in their organization certificate, and nowhere else. For all practical purposes they exercise their functions only within the limits of the state in which they are located, and should one of them attempt to carry on business outside of those limits, it would find itself completely without authority. For these reasons we conclude that a national bank, being a corporation created by competent authority and located within a state, with power to transact business there and not elsewhere, should be regarded for all the purposes of the jurisdiction of the federal courts, as on an equal footing with state corporations. This view is much strengthened by the provision of the bank act already quoted, which gives these corporations power to sue and be sued "in any court of law or equity as fully as natural persons." If this provision is construed as excluding all cases by or against a national bank which could not be brought by or against a natural person, it must also, we think, be construed as including all cases in which the court would have jurisdiction, if the bank were a natural person. In other words, congress, by enacting this provision, must be supposed to have assumed that these corporations would be regarded, for jurisdictional purposes, as citizens of the states where located; for otherwise it would have been impossible to confer upon them the right to sue in all courts "as fully as natural persons." It must have been understood by congress that they were, for jurisdictional purposes, to stand in the attitude and possess the attributes of natural persons.

It is insisted that jurisdiction in this case is by necessary implication excluded by the terms of section 629 of the Revised Statutes, which, among other things, provides that the circuit courts shall have original jurisdiction "of all suits by or against any banking association established in the district in which the court is held, under any law providing for national banking associations." But it is very clear that the effect of this provision is not to oust the court of jurisdiction under other provisions of the statutes of the United States. It gives to the circuit court jurisdiction in cases by or against national banks "established in the district in which the court is held," independently of any question of citizenship, and without reference to the subject-matter; but it does not prohibit the exercise of jurisdiction in any case which, under the bank act itself or under the judiciary act or any of its amendments, might have been brought independently of that provision. There is nothing in the language in question to exclude jurisdiction in any other class of cases; it is permissive merely, and there is no necessary conflict between it and the provisions of law under which jurisdiction is claimed in the present case. Our attention has also been called to the provisions of section 640 of the Revised Statutes, by which national banks are excluded from the right conferred upon other federal corporations, to remove suits brought against them in the state courts; but we are unable to see that this provision has any application to the question of the original jurisdiction of the circuit courts. The conclusions we have reached are supported by the following authorities, and we know of none to the contrary: *Manufacturers' National Bank* v. *Baack*, 8 Blatchf. 137; *Cook* v. *State National Bank*, 52 N. Y. 96; *Davis* v. *Cook*, 9 Nevada, 134; Dillon on Removal of Causes, 51. The demurrer to the petition is overruled LOVE, District Judge, concurs.

OSBORN *v.* THE COUNTY OF ADAMS.

(District of Nebraska. January, 1881.)

1. ELECTION PRECINCT, CANNOT BE SUED.— An election precinct has no corporate existence, and can neither sue nor be sued, under the laws of this state.
2. MANDAMUS ONLY ISSUES AFTER JUDGMENT.— A *mandamus* cannot properly issue out of the federal courts until after a claim in dispute has been reduced to judgment.
3. COUNTY MAY BE SUED TO ENFORCE VALID PRECINCT BONDS.— A suit can be maintained against a county to enforce the payment of a bond voted by and issued for a precinct to aid in works of internal improvement when such bonds are authorized by law.
4. BONDS TO AID THE ERECTION OF STEAM GRIST MILL INVALID.— There is no law in Nebraska that authorizes the precincts to vote, or the county commissioners to issue bonds for and on behalf of a precinct, for the purpose of aiding in the erection and construction of a steam grist mill, and bonds issued therefor are simply void.

Suit on coupons detached from precinct bonds, issued to aid in the erection and construction of a steam grist mill.

Demurrer to the petition.

The facts are sufficiently stated in the opinion.

A. H. Bowen, for plaintiff.

John M. Ragan, for defendant.

DUNDY, *District Judge.*— This suit is based upon one hundred and twenty-two coupons, each for the sum of twenty-five dollars, which were detached from a series of bonds of five hundred dollars each, voted by the people of Juniata precinct, and issued for and on behalf of said precinct by the county commissioners of Adams county, to aid in the erection of a steam grist mill. It is shown by the petition that on the 26th day of November, 1872, an election was held in said precinct, at which time bonds to the amount of six thousand dollars were voted, and that on the same day bonds were issued in that sum for the purpose aforesaid. That the bonds and

coupons were purchased by the plaintiff before due, without notice and for a valuable consideration and that the same are wholly unpaid.

The defendant demurs to the petition and two important questions are presented for consideration by the demurrer:

First. Has the court jurisdiction to hear and determine the matter in dispute between the parties, and

Second. Do the facts stated in the petition constitute a cause of action, and justify a recovery against the defendant, or rather against the precinct represented by the defendant?

The defendant has not seen proper to state just why the court is without jurisdiction in the premises, but I conclude that it is because of the supposed want of authority to proceed against a county to enforce the payment of a bond issued on behalf of a precinct. It is clear enough that the laws of this state authorize the qualified voters of an election precinct to vote for the issuing of bonds for specified purposes, and when properly voted they are to be issued by the county commissioners of the county in which the precinct may be situated. It is equally clear that an election precinct formed under the laws of this state has no corporate existence. Such a political subdivision is formed for mere convenience of voting. It cannot sue or be sued, because it has no officers of its own to prosecute or defend a suit. The supreme court of this state has given an authoritative exposition of the law upon this subject, and that must be deemed conclusive until otherwise decided by the highest judicial tribunal in the land. This court, too, at the present term has held the law to be as here stated. *Blair* v. *West Point Precinct*, U. S. C. C. Neb. *Chandler* v. *Dodge County*, 10 Neb. 20.

As a general rule, when and where a right exists, the law furnishes an adequate remedy to enforce the same when it is in any way impaired or impeded. It is conceded that precinct bonds may be lawfully issued for some purposes. If that be true, it necessarily follows that a remedy must exist to enforce the payment thereof, and if the precinct itself cannot be sued,

though primarily liable for the payment of the bond, then reason, it would seem, must point directly to the officers who execute the bonds as the ones who must respond on behalf of the precinct. And more especially is this so where a *mandamus* cannot be issued until after a proper suit has been instituted and the claim reduced to judgment, as seems to be required by all the federal courts. Indeed, whatever may be thought or said of the propriety of sustaining an action against a county to enforce payment of a precinct bond, the question must be regarded as no longer open to argument in this court. Ever since the decision of the case of *Chandler* v. *The County Commissioners of Dodge County*, brought in this county, the right to sue a county to recover on a precinct bond has been sanctioned and upheld. This case went to the supreme court where the judgment was affirmed, though the question here under consideration was not raised in the supreme court. The case of *Blair* v. *West Point Precinct*, before referred to, is authority on this point.

The demurrer draws in question the validity of a precinct bond issued to aid in the erection and construction of a steam grist mill, and if the bonds from which the coupons in suit were detached cannot be upheld under the provisions of the "internal improvement law" of the 15th of February, 1869, then the bonds must fall, and this suit with them. There is no other law or part thereof conferring the right on electors of a precinct to vote bonds for any purpose. Section 1 and section 7 of this act are as follows:

"Section 1. That any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement, to an amount to be determined by the county commissioners of such county, or city council of such city, not exceeding ten per cent. of the assessed valuation of all taxable property in said county or city. Provided, the county commissioners or city council shall first submit the question of the issuing said bonds to a vote of the legal voters of said county or city in

the manner provided by chapter nine of the Revised Statutes of the state of Nebraska, for submitting to the people of a county the question of borrowing money.

"Section 7. Any precinct in any organized county of this state shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act; and in such cases the precinct election shall be governed in the same manner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds."

The language here employed to confer the authority is, "to aid in the construction of any railroad, or other work of internal improvement." Is a steam mill a work of internal improvement, within the meaning of the law above quoted? The first section of the act referred to specially describes railroads, and then uses the general term or phrase, "or other works of internal improvement." There is a long line of authorities which seem to settle very effectually this doctrine, to wit: That where a law or written instrument is couched in specific and definite language and special authority is conferred for doing particular things, and then a general authority is thereinafter given, the general authority so conferred must be held to relate to matters similar to the ones specially described. Applying the principle here stated to the construction of the law under which the bonds were voted, all reasonable doubts of their validity will at once cease. It would then be equivalent to saying that bonds may be voted to aid in building railroads and other works or internal improvements of a similar nature. This would perhaps authorize the voting of bonds to aid in the construction of canals, bridges and wagon roads, as well as railroads. All these

objects would facilitate the transportation of persons and property from place to place, and would promote the great objects had in view by the legislature when the said law was enacted. In giving the law this construction we do no violence to language or principle. So far as known, no court in this state has gone beyond the principle of construction here applied. It has been held in several cases, that the right to erect public buildings, such as jails and court houses, derives no support from the law before cited. See *U. P. R. R.* v. *Lincoln County*, 3 Dillon, 300; *Dawson County* v. *McNamar*, 10 Neb. 276; *Lewis* v. *Sherman County*, decided at the present term of court. And this seems to be the settled law in this state. Yet in some of the authorities outside of the state, court houses and jails are held to be "internal improvements" to which public aid may be voted under laws similar to our own. But the statute law in every case where the voting of bonds is specially authorized is essentially different from the one under consideration. But it is claimed that the case of *Township of Burlington* v. *Beasley* (IV Otto, 310), decided by the supreme court of the United States, is also decisive of the controversy involved in this suit. I think otherwise. Applying the same principle to both cases we would arrive at the same conclusion reached in either. The case last referred to originated under the internal improvement law of the state of Kansas. That law specially authorizes "counties, incorporated cities and municipal townships, to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water power and other works of internal improvement." The Kansas law is much more comprehensive and liberal than the law of this state. It authorizes the voting of aid for specific purposes where our law is silent. It confers ample authority for certain purposes while our law withholds it.

Authority is given to aid in developing water power in Kansas, but in this state the legislature has withheld the right so to do. And so far as known, no one has, until recently,

seriously claimed that such a doubtful authority could be rightfully exercised under the provisions of existing law.

If the law in this state, as in Kansas, had authorized the voting of bonds to aid in developing water power and building grist mills for the purpose of supplying the public with food, then there would be no good reason why aid could not also be voted to a steam grist mill. To develop the water power would simply be to furnish the motive power to do the business in question. The object to be gained in such case is to furnish facilities for grinding grain for the use and benefit of the interested public. This being true, there would seem to be no good reason why aid could not be voted, under the Kansas law, to aid in the erection of a steam grist mill. The object to be gained would be precisely the same in either case. That is, the furnishing of motive power to propel the necessary machinery to accomplish the identical purpose and produce the same result. And I apprehend it is because of this reason, the similarity of results, that brought about the decision in the Kansas case. Thus, bonds could be voted to develop the water power for the purpose stated. This authority is given in express terms. "Other works of internal improvement," in the language of the law, may all receive public aid. A water grist mill and a steam grist mill are similar in many respects, in fact in almost every respect except in the motive power. Both are operated for the same purpose, and both accomplish the same results. So when a water mill can be aided under the specific clause in the law, a steam mill may be aided under the general clause giving the right to aid "other works of internal improvement," for the manifest reason that it, the steam mill, is similar to the water mill specially authorized, and falls within the principle of construction hereinbefore stated. There is then, no inconsistency between the decision of the supreme court in the Kansas case, and the conclusions reached in the present case. The demurrer must be sustained.

I am authorized to say that Judge McCrary concurs in this judgment.

Sousteby *v.* Keeley *et al.*

(District of Minnesota. December, 1880.)

1. Vendor's Fraud — Privity — Notice — Remedy.— It is a sound rule of equity, that where the vendee of personal property buys in good faith, and without notice of fraud on the part of the vendor, and pays only a part of the consideration, agreeing to pay the remainder at a future day, if before final payment he receives notice of the vendor's fraud, he will be protected only to the amount actually paid before notice; but it is doubtful whether this rule can be applied and enforced in a court of law.
2. Sale of Personal Property — Promise by Vendee to Pay Vendor's Debt.— There is a conflict of authority in this country upon the question whether a promise made by the vendee of personal property, in consideration of the purchase, to pay a debt due from the vendor to a third party, is a contract upon which the latter may sue the former. Authorities cited. The affirmative has been held by the supreme court of Minnesota, and the negative by the supreme court of the United States.
3. State and Federal Decisions — Rule of Decision in Federal Courts.— Even upon questions of purely commercial law, the federal courts should follow those of the state, if it appears that by reason of the situation of the parties and of the subject-matter, to hold otherwise would subject a party to double payment of the same debt, without the possibility of relief from the federal courts. Such a case presents reasons for following the supreme court of the state, so cogent as to justify a circuit court in making it an exception to the rule requiring it to follow the rulings of the supreme court of the United States.

Motion for a new trial.

Prior to September, 1878, one Forbes was the owner of a stock of dry goods kept in a store at Waseca, Minnesota. On the seventeenth of that month Forbes executed a bill of sale of said stock of goods to the plaintiff, and also delivered to him the possession thereof. Subsequently the sheriff, by virtue of certain writs of attachment against Forbes, levied upon and took possession of the goods as the property of said Forbes, under the claim that the sale to plaintiff was fraudulent and void, because made to hinder, delay and defraud the creditors of Forbes. The plaintiff paid for said stock to Forbes some $3,000 in cash, and assumed the payment of certain debts,

held by a bank in Waseca against Forbes, amounting to about $3,800, making in all $6,800, the price agreed upon.

Upon the trial the court instructed the jury, in substance, that the assumption by plaintiff of this indebtedness held by the bank was a sufficient payment of so much on account of his purchase of the stock of goods; that plaintiff's promise to pay said debts bound him, and was a payment as much as the payment of a like amount in money. It is conceded that under the instruction of the court, the jury must necessarily have found that plaintiff purchased without any fraudulent intent and without any notice of any such intent on the part of Forbes. Assuming that the jury may have found fraud on the part of Forbes, the vendor, the counsel for defendant invoked the doctrine that "the protection to which a *bona fide* holder after notice is entitled extends only to the amount that has been actually paid," and insisted that the portion of the price which was settled by assuming the bank debts was not actually paid by the plaintiff. The court, however, charged the jury as already stated that payment might be made by assuming and agreeing to pay outstanding debts of the vendor. The proof showed that the agreement by which plaintiff assumed and agreed to pay the bank debts was made, or at least repeated, in the presence of the cashier of the bank, to whom a list of the debts was exhibited, with the statement that plaintiff had agreed to pay them. There was no proof of any agreement of the bank to look to plaintiff or to release Forbes, except the proof that the cashier was advised of, and assented to, the arrangement.

The court held this to be sufficient to bind plaintiff to pay said bank debts, and therefore a payment by him of so much on the purchase price of the goods. This is the ruling now complained of.

Wilson & Gale, Rogers & Rogers, for the motion; *C. K. Davis, contra.*

McCrary, *Circuit Judge.*—1. I have grave doubts as to

the propriety of attempting to apply to a case at law the principle invoked by counsel for defendant in this case. That principle is that where the vendee buys in good faith, and without notice of fraud on the part of the vendor, and pays a part only of the consideration, agreeing to pay the remainder at a future day, if, before such remainder is paid, he receives notice of the vendor's fraud, he will be protected only to the amount actually paid before notice. No doubt, this is a sound principle of equity; but can it be applied by a court of law? Can such a court rescind the contract *pro tanto*, and place the parties in *statu quo*? If so, can it be done in a case like the present, in which no issue is made except upon the validity of the sale? If the sale was held void so as to leave the title in Forbes, against whom the attachments were issued, judgment at law could be rendered for defendant; but where the sale is found to be valid and *bona fide* in so far as the vendee is concerned and the title is vested in him, and where he has sold or disposed of a portion of the stock and probably expended money and given time and labor in its care and preservation, it seems probable that only a court of equity would be competent to grant any relief to the creditors of the vendor.

2. But it is not necessary to pass finally upon this question, as I am clearly of the opinion that the proof shows a payment by plaintiff of the whole of the purchase price. It is contended that the promise by plaintiff to assume and pay the indebtedness of Forbes at the bank, though made as a part of the consideration for the purchase, was not payment, and this for the reason that plaintiff is not legally bound to pay those debts. It is said that the holders of those claims cannot sue plaintiff and recover upon them. Upon this question there is a conflict of authority in this country. In many of the states, the right of action by the payee of such debts, against the party assuming to pay them, is maintained even where such payee is not a party to the contract.

This upon the ground that such a promise is an original promise, based upon a valuable consideration, namely, the sale

and delivery of the goods. 1 Pars. Con. (5th ed.) 466–8; *Fanly* v. *Cleveland*, 4 Cow. 432; id. 639; *Canal Co.* v. *Bank*, 4 Duer, 97; *Lawrence* v. *Fox*, 20 N. Y. 268; *Arnold* v. *Lyman*, 17 Mass. 400; *Carnagie* v. *Morrison*, 2 Met. 404; *Crocker* v. *Stone*, 7 Cush. 338; *Hynd* v. *Holdship*, 2 Watts, 104; *Burs* v. *Robinson*, 9 Barr, 229; *Eddy* v. *Roberts*, 17 Ill. 508; *Todd* v. *Tobey*, 29 Me. 219; *Motley* v. *Manufacturing Ins. Co.* id. 337; Metcalf on Contracts, 205–11, and cases cited in notes.

And such is the law in Minnesota, as repeatedly decided by the supreme court of that state. *Sanders* v. *Clason*, 13 Minn. 379; *Goetz* v. *Foos*, 14 Minn. 265; *Merriam* v. *Lumber Co.* 23 Minn. 314. But the opposite doctrine is maintained by numerous cases, and among them by the supreme court of the United States, in *National Bank* v. *Grand Lodge*, 98 U. S. 128; 2 Chitty Con. (11th ed.) 74, and cases cited in notes. *Mellon* v. *Whipple*, 1 Gray, 317.

Ordinarily this court would feel bound to adopt and follow the rule laid down by the supreme court in *National Bank* v. *Grand Lodge*, *supra;* but under the peculiar circumstances of the present case, I am clearly of the opinion that I ought to apply the rule established by the supreme court of the state of Minnesota. It will be observed that the plaintiff assumed and agreed, in consideration of the sale to him of the stock of goods, etc., to pay certain debts held by the bank against Forbes. In so far as the debts are the property of the bank, it is certain that they can be sued upon only in the state courts; for it appears that the bank is a corporation of the state of Minnesota, and the plaintiff a citizen of that state. How many of these debts belong to the bank, and how many to other parties represented by the bank, and how many of such other parties are citizens of Minnesota, does not appear, nor is it material; it is enough to say that, certainly a part and probably the whole of said debts could only be collected by suit in the state courts. It may be that some of the claims are for less that $500, and for that reason not within the juris-

diction of this court. I must assume, therefore, that in case plaintiff refuses to pay said claims, suits must be brought, certainly upon some of them, and probably upon all of them, in the courts of Minnesota.

So far as those courts are concerned, as already seen, the law is settled by repeated decisions of the supreme court, and in accordance therewith the plaintiff would be held liable in a suit by the payee of any of said debts. The question therefore is, shall this court hold that the creditors of Forbes are entitled to recover from plaintiff the sum of those debts in this case, and thus subject him to a second payment of the same amount to the holders of the claims?

A decision which would establish injustice such as this is not, I am sure, required at my hands. It is true that this case does not belong to the class in which, as a rule, the federal courts are required to follow the decisions of the highest judicial tribunal of the state. But, although the question is a new one, I am clearly of the opinion that, even on questions purely of commercial law, the federal courts should follow those decisions if it appears that by reason of the situation of the parties and of the subject-matter, to hold otherwise would subject a party to double payment of the same debt, without the possibility of relief from the federal courts. Motion overruled.

SHERMAN, Assignee, etc. *v.* SAVERY AND OTHERS.

(District of Iowa. March, 1880.)

1. VENDOR AND VENDEE — VENDEE'S RIGHT TO POSSESSION OF LAND.— Where land is vacant, and a contract for its transfer is silent as to possession, and the vendee has fully performed on his part, and it only remains for the vendor to make the necessary conveyance, his rights are fixed, and there is an implied agreement or license that the vendee may at once take possession and have the use of the land.
2. SAME — LIABILITY OF VENDEE FOR TAXES.— A vendee in such case should pay his proportion of taxes thereafter assessed upon such land, and

it is no defense against such obligation that the vendor refused to convey to him, but conveyed to another against whom a decree for specific performance has since been entered.

3. SAME — SAME — VOLUNTARY PAYMENT OF TAXES BY TRUSTEE. — Where lands which a vendee was entitled to have conveyed to him were transferred by the vendor to another, who was subsequently held to be trustee for such vendee, and decreed to convey to him, *held*, that taxes paid by such trustee to protect the title subsequently conveyed to vendee was not a voluntary payment, and he was entitled to reimbursement therefor although the decree of the state court, under which such conveyance was made, ordered a conveyance "free from incumbrances executed or suffered."

NELSON, *District Judge.*— The present suit is brought by the complainant for a partition of real estate described in the bill of complaint. Cross-bills are filed by some of the defendants; one by Taylor, who claims contribution for taxes paid by him upon the entire property, most of it pending a suit to enforce the specific performance of a contract for the sale of an undivided one-half of the lands.

The only question in controversy arises upon the claim of Taylor as set out in his cross-bill. The facts are these: On May 16, 1863, the following contract was entered into between F. C. D. McKay, of Des Moines, and the county of Cerro Gordo, in the state of Iowa:

"Agreement made the sixteenth day of May, A. D. 1863, between the county of Cerro Gordo, state of Iowa, of the first part, and F. C. D. McKay, of Des Moines, in said state, of the second part, witnesseth: Whereas, the said county has expended large sums of money in attempting to acquire title to her swamp lands, and to secure the claim of the county on the United States for such of her swamp lands as have been sold by the general government or located with warrants, and has, so far, been unsuccessful; and, whereas, by the recent decisions and rulings of the commissioner of the general land office, the swamp-land interest and claim of said county is involved in great jeopardy and will require expenditures in costs, expenses and efforts, in order to secure it: Now, therefore, said county hereby agrees to put its swamp-land interest and

claim into the hands of the party of the second part for prosecution, settlement and collection, as fully as the same exist, whether for lands, scrip or cash. The county also agrees to furnish the records and papers in its possession to the party of the second part to aid said work.

"The county also agrees to nominate and appoint such agents as the party of the second part may desire to select or reselect said lands, if necessary, and to make the indemnity proofs, and also to nominate to the governor such persons as the party of the second part may request for special agent, under the thirteenth section of the act of the general assembly of the state of Iowa, entitled 'An act to authorize the governor and board of county supervisors to appoint agents in regard to swamp lands belonging to the state of Iowa, and to define their duties,' approved April 8, 1862; such agent to give the bail by law required, and to deliver the proceeds to the board of supervisors as required by said thirteenth section of said act.

"The party of the second part take said interest and claim for said purpose, and agree to prosecute the same thoroughly and with dispatch; to make such selections and proofs as may be necessary, so far as practicable; to retain such counsel and help as may be necessary to pass said claim at Washington; to close up and finish the business at the earliest practicable time; and to pay all the expenses of all such agencies and of doing said business at Washington and elsewhere, so that said county shall have nothing to pay whatever, if nothing is obtained out of said interest or claim; and in case any lands, scrip or money or all, are obtained, then, out of such proceeds, the county is to pay to the parties of the second part the sum of $1,000, to cover such costs and expenses and efforts in full, and the remainder of all the proceeds of such business is to be equally divided between the parties hereto; the county to take and have one-half thereof, and to pay and deliver the other half thereof to the party of the second part; each

sharing alike in such equal division as to land, scrip and money.

"By order of the board of supervisors.

[Stamp.]

"JARVIS J. ROGERS, Chairman.
"DAVID BUTTS,
"GABRIEL PENCE,
"EDGAR OSBORNE,
"E. D. HUNTLEY,
"Supervisors.

"Attest: F. C. D. McKAY.

"H. B. GRAY, Clerk.

"By H. G. PARKER, Deputy.

"*State of Iowa, Cerro Gordo County — ss.:*

"I, B. F. Hartsorn, clerk of the board of supervisors in and for said county, do hereby certify the foregoing to be a full, true and correct copy of a contract entered into by and between the aforesaid county and F. C. D. McKay on the sixteenth day of May, 1863, as appears from the original now on file in my office.

"Witness my hand and the seal of said board this sixteenth day of June, 1866.

[L. S.] "B. F. HARTSORN,

[Stamp.] "Clerk Board of Supervisors."

Under this contract McKay and his associate, after five years of toil and the expenditure of large sums of money, secured from the United States government, for said county, in cash, $7,257.62, and 30,053 78–100 acres of land. The cash was remitted by draft of the treasurer of the United States, payable to the order of the governor of Iowa, for the use of Cerro Gordo county.

The land was approved and patented to the state of Iowa by the United States, for the use of Cerro Gordo county, and on the thirteenth of March, 1868, was patented by the state to Cerro Gordo county, and as this patent recites in detail the history of the title, it is here set out in full:

"*State of Iowa: To all to whom these presents shall come—Greeting:*

"Whereas, by the act of congress approved September 28, 1850, entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits,' it is provided that all the '*swamp and overflowed lands*' made unfit thereby for cultivation, within the state of Iowa, which remained unsold at the passage of said act, shall be granted to said state; and, whereas, by an act of the general assembly of the state of Iowa, approved February 2, 1853, entitled 'An act to dispose of the swamp and overflowed lands within the state, and to pay the expenses of selecting and surveying the same,' and other acts amending or supplemental thereto, the said swamp and overflowed lands, and the indemnity therefor, were granted to the counties respectively in which the said swamp and overflowed lands may lie or be situated;

"And, whereas, by the first section of the act of congress, approved the second of March, 1855, 'for the relief of purchasers and locators of swamp and overflowed lands,' authority is conferred on certain conditions to purchasers or locators, who have made entries of the public lands claimed as swamp lands, either with cash or with land-warrants or with scrip, prior to the issue of patents to the state, as provided by the second section of the act approved September 28, 1850;

"And, whereas, by the second section of the act aforesaid of the second of March, 1855, it is provided, among other things, that upon due proof being produced to the commissioner of the general land office, as therein mentioned, that the class of lands that had been located by warrants or scrip are swamp lands, within the meaning of said act of 1850, that said state shall be authorized to locate a quantity of like amount upon any of the public lands subject to entry, at one dollar and a quarter per acre or less, and patents shall issue therefor, upon the terms and conditions enumerated in the act aforesaid of March 2, 1855, provided that the said decis-

ions of the commissioner of the general land office shall be approved by the secretary of the interior;

"And whereas, a special certificate, dated March 1, 1867, was issued by the commissioner of the general land office, authorizing the state of Iowa to locate the quantity of 30,057.54 acres as indemnity contemplated by the second section of the aforesaid act of the second of March, 1855, for swamp and overflowed lands in Cerro Gordo county, entered of the United States by location of military bounty land warrants, and the said certificate having been returned to the general land office, accompanied by a list showing the selections in satisfaction thereof of the lands hereinafter described, situated in the Sioux City land district;

"And, whereas, the said land hereinafter described has been approved and patented by the United States, in pursuance of the acts of congress aforesaid, to the state of Iowa, to wit: [Here follows description of the land in controversy] according to the official plats of the survey of said lands:

"Now, therefore, know ye that the state of Iowa, in consideration of the premises, and in conformity with the act of the general assembly aforesaid, have given and granted and by these presents do give and grant, unto the said county of Cerro Gordo, in fee-simple, to be disposed of according to the several acts of the general assembly relating thereto, the tracts of land above described.

"To have and to hold the same, together with all the rights, privileges, immunities and appurtenances thereunto belonging, unto the said county of Cerro Gordo, in fee-simple, and to its assigns forever.

"In testimony whereof, I, Samuel Merrill, governor of the state of Iowa, have caused these letters to be made patent, and the great seal of the state of Iowa to be hereunto affixed.

"Given under my hand at Des Moines, the thirteenth day of March, in the year of our Lord one thousand eight hun-

dred and sixty-eight, and of the state of Iowa the twenty-second. SAMUEL MERRILL.

"By the Governor.

"ED. WRIGHT, Secretary of State.

"I certify that the foregoing deed is recorded in vol. 1, page —. C. C. CARPENTER,

"Register State Land Office."

At the June session, 1868, of the board of supervisors, Mr. Savery, who was associated with McKay, reported to them the success of McKay under the contract of sixteenth May, 1863, and demanded a settlement under said contract; but no settlement was effected, and within a few months afterwards the county of Cerro Gordo granted all of said lands to the McGregor & Sioux City Railway Company; before doing so, however, taking from said company a bond of indemnity in words as follows:

"*Know all men by these presents*, that the McGregor & Sioux City Railway Company does hereby covenant and agree to and with the county of Cerro Gordo, state of Iowa, in consideration of said county entering into a contract with said company to convey to said company certain lands, held and owned by said county as indemnity for swamp lands, to procure said company to construct a railway in said county; said McGregor & Sioux City Railway Company will, if said contract is ratified by and held for that purpose, and said lands are conveyed to said company, as specified in said contract, hold said county free, harmless and exempt from all costs, expenses and liabilities to the American Emigrant Company for any claim or pretended claim, right or demand said American Emigrant Company may have against said county for any part or parcel of said lands.

"Witness the signature of said company, hereto affixed, this August 21, 1868.

[Stamp.] "MCGREGOR & SIOUX CITY R. W. Co.,

"By JOHN LAWLER,

"Vice President and General Agent of said Company."

And afterwards, on the seventh of October, 1872, the said railway company conveyed said lands to Horace S. Taylor by deed in words and figures following:

"*Know all men by these presents*, that the McGregor & Missouri River Railroad Company, in consideration of the sum of sixty thousand one hundred and seven and 56-100 dollars, to be paid them in five years from date, with annual interest at 7 per cent. per annum, payable on the first day of October in each year by Horace S. Taylor, of the city of New York, do hereby sell and convey unto the said Horace S. Taylor the following described lands situated in Woodbury, Sioux and Lyon counties, in the state of Iowa, viz.: All of the lands described in a deed dated fifth of October, 1868, made by the county of Cerro Gordo, Iowa, to the McGregor & Sioux City Railway Company, which company is now named the McGregor & Missouri River Railway Company, amounting to thirty thousand and fifty-three acres and 78-100 of an acre, which deed is recorded in book "F," pages 225 to 232, of the records of Woodbury county, Iowa, and in book "C," pages 519 to 526, of the records of Sioux City, Iowa, to which deed reference is here made; and they hereby covenant with said grantee that the title to said lands in the same are acquired by the grantors from the county of Cerro Gordo, Iowa, and that the title has in no way been incumbered by the grantors, except by certain contracts of sale, and to which this sale and conveyance is subject, namely:

"Contract for N. ½, N. E. of section 5, township 99, range 45, to C. H. Moore.

"Contract for N. ½ of section 4, in township 99, range 45, to S. Lockwood Bailey and certain others.

"Contract for all of section 8, in township 100, range 45, to S. Lockwood Bailey.

"Contract for S. E. ¼ of section 14, in township 98, range 46, to G. R. Badgerow; and such other contracts (if any) as may have been entered into by O. E. Palmer, agent, which are not yet reported to the company.

"And the grantors will warrant and defend the said lands to the said grantee, and to his heirs and assigns, forever, subject to certain contracts as aforesaid, against the claim or demand of all persons whatever claiming the same, by, through or under the grantors. The grantors reserve a vendor's lien for the purchase money above named, viz.: sixty thousand one hundred and seven and 56-100 dollars.

"In witness whereof they have hereunto set their hand and seal this seventh day of October, A. D. 1872.

"McGregor & Missouri River Railway Company,

"By Russell Sage, President.

"Witness: John A. Hillery. [L. S.]

"J. M. Bush, Assistant Secretary."

On the fifth of February, 1870, B. F. Allen, who had become associated with F. C. D. McKay in the contract of May 16, 1863, brought a suit in equity in the district court of Polk county, Iowa, against Cerro Gordo county, the railway company, and the governor of Iowa, to compel a specific performance of the McKay contract.

On the eighteenth of March, 1874, Horace S. Taylor appeared in said cause and asked to be made a party defendant, and filed the following pleading:

"*To the District Court aforesaid:*

"Your petitioner, Horace S. Taylor, respectfully represents that he is the owner in fee in the real estate described in the plaintiff's petition in this cause, and to recover which plaintiff in this cause brought this action; that said land was conveyed to him by deed by the defendant, the McGregor & Sioux City Railway Company, now called the McGregor & Missouri River Railway Company, dated October 7, 1872, a copy of which deed is hereto annexed, marked Exhibit A, and made a part hereof. Your petitioner therefore asks that he be made a party defendant in this action, and be allowed to defend, and that he be substituted as defendant in the place and stead of the said McGregor & Missouri River Railway Company.

"Horace S. Taylor."

A trial was had and a decree ordered in accordance with the prayer of the plaintiff's bill by the court below on the —— day of ——, 1874.

The cause was taken to the supreme court of the state, and was tried there *de novo* on its merits, the decree of the district court affirmed, and a new and full and final decree entered in the supreme court on the twenty-second of April, 1875. This decree is set out in full as an exhibit to complainant's bill in this cause, and we point only to the following extracts from the same, to wit: "It is ordered and adjudged that the defendants, the county of Cerro Gordo and McGregor & Sioux City Railway Company, now the McGregor & Missouri River Railway Company, and the defendant Horace S. Taylor, are ordered and directed within twenty days from this date to execute deeds of release, with special warranty against conveyances or incumbrances, executed or suffered by them respectively to the said B. F. Allen for an undivided one-fourth of all the lands hereinbefore described, and to J. C. Savery for an undivided one-eighth of all the lands, etc., with like covenants; and to Angeline J. McKay for an undivided one-eighth, etc., with like covenants, and deposit the same with the clerk of this court, etc.

"And that in default of the delivery of such conveyances, duly executed to the clerk of this court, within twenty days from the rendition of this decree, the clerk of this court is hereby appointed and he is hereby directed to execute such conveyance in the name of said several defendants, with like covenants in their name and behalf.

"And it is further ordered and adjudged that the said McGregor & Sioux City Railway Company, now the McGregor & Missouri River Railway Company, purchased the interest of said Cerro Gordo county in the lands in controversy, upon a covenant to save said county harmless and exempted from all costs and expenses by reason of the contract in controversy herein; and that the said county of Cerro Gordo have and recover of the said McGregor & Sioux City Railway Company,

now the McGregor & Missouri River Railway Company, all costs in this suit adjudged against said county and that may have been paid or that shall be paid in this cause by said county, or any fund to which it is entitled under this decree."

Under this decree the railway company and Taylor having failed to execute the conveyances within the twenty days, the same were executed by the clerk of the supreme court, with the covenants authorized by the decree. These conveyances were executed September 14, 1875.

The defendant "Hervey" obtained his interest in the lands from Savery on June 19, 1875, and Stewart from Mrs. McKay on September 25, 1875, after the decree for a specific performance, and it is agreed by a stipulation on file that the present interest of parties is: Taylor, one-half (½); Sherman, assignee, one-fourth (¼); Stewart, one-eighth (⅛); Hervey, one-eighth (⅛).

In considering the question presented, it is necessary, first, to determine McKay's rights under the contract. It was clearly the intention that he should become a tenant in common to the extent of an undivided one-half of all the swamp lands he might secure to the county of Cerro Gordo, and his equitable interest was fixed on March 13, 1868, when the land was patented by the state of Iowa to the county. McKay having fully performed his part of the contract was entitled to a deed from the county for the undivided one-half (½) of the land, and had a right to the use of the property as a tenant in common.

The contract, after its fulfillment by him, impliedly gave a license to such possession as is secured to tenants in common. All that was necessary to be done by the county was to give a deed and thus complete the contract.

In equity, McKay is considered the owner of an undivided one-half of the lands at the time the county obtained the deed from the state. He was entitled from that time to one-half of any income derived from the property. He was interested in protecting the property from waste, and was entitled to all

increase and gain on its value, and must share in all the disadvantages, expenses and outgoings. It is claimed that under this contract the right of exclusive possession to the entire lands remained in Cerro Gordo county and the railway company, and its grantee, Taylor, until a conveyance was made under the decree for a specific performance. I do not so understand the equitable rule. I think the doctrine defining the rights and liabilities of a vendee under a contract of this character is settled as I have stated it.

The rule is thus given by Earl, J. (*Miller* v. *Ball*, 64 N. Y. 293): "It may be stated, as a general rule, that in all cases where the contract is silent as to the possession, the land being vacant, and the vendee has paid the entire consideration, and fully performed on his part, and all that remains for the vendor to do is to give the deed, there must be an implied agreement or license that the vendee may at once take possession and have the use of the land."

If this doctrine is sound, then, although the county of Cerro Gordo granted all the lands to the McGregor & Sioux City Railway Company, and by the latter they were sold and conveyed to Taylor, with knowledge of all the facts, the equitable rights and liabilities of McKay and his successors in interest are not changed, and they should pay a proportion of the taxes which were a charge upon the land; at least should reimburse Taylor, who held the lands in trust for them.

It is urged that the county of Cerro Gordo having wrongfully withheld the deed when demanded by McKay, and refused to recognize his rights under the contract, and the railway company and Taylor being equally at fault, they should keep down the taxes, and Taylor is not entitled to any favor in a court of equity. If I am right in the construction of this contract, and the equitable interest of the parties thereto was fixed when the condition was performed by McKay, then a refusal by the county to convey his interest, and a grant of the lands to the railway company and to Taylor, did not change his equitable rights. He was placed in no

better or worse position, so far as the equities are concerned, by the act of the county. The railway company took the title subject to his equities, and Taylor, with knowledge of the facts, occupied the same position as trustee. If the contract had been completed by the county and a deed given, McKay and his successors in interest would have been required to pay the taxes. Why should they occupy a better position now? At least, why should they not reimburse Taylor?

The counsel urge, in addition, as a reply to such interrogatory, the payment of taxes was voluntary. If so, then, under the well-established doctrine affirmed in the case of *Homestead Co.* v. *Valley Railroad*, 17 Wall. 153, 166, Taylor can have no relief. Was the payment of taxes voluntary? I think not. Taylor held the title to an undivided one-half of the lands in trust for McKay and his successors in interest. It was so decided in a suit for specific performance, and Taylor was ordered to make conveyances. He was required, while such trustee, to protect the title and prevent a sale of the property and extinguishment of the interest he held in trust. He did so, and the payment of taxes was in fulfillment of his duty, and not voluntary. See *Duff* v. *Dorman*, 52 N. Y. 634.

The authorities cited by counsel are not in conflict with the views above expressed. Judge Wright, in one of the Iowa cases, decided that in contracts for the sale of land, silent as to payment of taxes, the party in actual possession of the land should keep down the taxes. It is stipulated the land here was vacant. In the English case of *Carrodus* v. *Sharp*, 20 Beav. 56, there was an agreement for the sale of a lease of a mill by the plaintiff. By the terms of the lease no assignment could be made until the assent of the lessor was obtained. The parties had some differences about the value of machinery and the defendant refused to perform. The assent of the lessor was obtained, and a decree for specific performance being granted, and a reference as to title being had, it was decided that the date when the assent of the lessor was ob-

tained fixed the time when defendant became a purchaser, and when he ought to take possession, and after that period he should pay the expenses and outgoings.

In this case McKay became a purchaser, and was entitled to his equitable interest when the county obtained a patent from the state, and the expenses and outgoings after that time must be paid by him and his successors.

Again, it is urged that the decree of the supreme court of Iowa, granting specific performance, settled all the equities, and a conveyance being ordered "free from incumbrances executed or suffered," it was intended to relieve the case of all embarrassment on the question of taxes. I am not prepared to admit this, although the point raised is close. The laws of Iowa imposed the taxes. Taylor was not consulted, but was passive in the matter, and was required to pay the taxes in order to protect the title held in trust, and it is not believed this clause in the decree concluded their adjustment.

I have given this case such examination as the pressure of business will admit, and have arrived at the conclusion that Taylor is entitled to relief. An appeal to the circuit court, which is allowed, will afford ample opportunity for the correction of any error.

A decree for a partition is granted, and the amount of taxes paid by Taylor and only that, after he became the purchaser from the railway company, is allowed him, to be paid by the parties according to their respective interests in the lands.

A reference is ordered to the clerk, and the proper decree in conformity with this opinion will be entered, and the costs of the litigation shared by all parties.

NOTE.— On appeal to the circuit court the case was heard upon full oral and printed argument, and the decree of the district court was affirmed. October term, 1880.

IRON MINE *v.* LOELLA MINE.

(District of Colorado. May, 1880.)

1. VEIN OR LODE.— The law goes upon the hypothesis that all veins are more or less vertical in the earth; and the statute of the United States requires that the locations of mining claims shall be upon the top or apex of the vein.
2. RIGHT TO PURSUE THE VEIN.— Having discovered a vein, and located the claim so that the top or apex thereof is within his surface lines extended down vertically, the locator is, by the law, permitted to follow it *to any depth*, although in its downward course the lode or vein may enter the adjoining land, as far as he can show that it is the same lode or vein. It does not matter that the decline be only a small degree from the plane of the horizon.
3. TOP OR APEX — MEANING OF.— The top or apex is the end or edge or terminal point of the lode nearest the surface of the earth, without regard to the depth from the surface at which it may be found. If found at any depth, and the locator can define on the surface the area which will inclose it, the lode may be held by such location.
4. IF THE LODE IS CONTINUOUS FROM SIDE TO SIDE of the claim —"that is to say, if coming in at one side it passes unbroken to the other"— the locator cannot follow it beyond his surface lines. No location can be made on the middle part of a lode, or otherwise than at the top or apex, which will entitle the locator to go beyond his lines.
5. QUERY.— Whether a location made on the dip of a vein, would not be valid as against one of later date made higher up? Whether if a location be made upon the dip of a vein, the locator may not pursue it in the downward course — although he may not in the upward course — and may not hold the whole which lies within his location below it, as against any person locating subsequently, at a higher point on the same vein?

HALLETT, *District Judge*, charging the jury orally said:

As to the matters which are particularly for your consideration, you have observed in all that has been said by the witnesses and the counsel, that it is a controversy relating to the lode and the vein at a point somewhat distant from the location. That is to say, according to the custom of miners, the plaintiffs or their grantors secured a location 300 feet in width and 1,500 feet in length at a certain point. In that ground, originating there by its top and apex, they say they have the top and apex of the lode, and having given proof,

which I think is uncontradicted, to the effect that there is a lode there, in pursuit of that lode beyond the lines of their location, and at a distance of four or five hundred feet east of their location, they have reached a point where they have come in conflict with the defendants. This location was made upon the surface or the declining surface of the hill — I do not know that any of the witnesses have stated to you the exact contour of that hill, how much it declines, but it is shown that it is a hill declining to the westward; that is, coming down from the east and declining to the westward, and they made their location on the side of that hill. The defendants went to the east of that location some four or five hundred feet — I do not know that we are told the exact distance, nor is it important; but they went upon the surface of the hill above the plaintiffs' ground at a considerable distance and there sunk down a shaft to a depth of three hundred feet — something like that — and have run down to the vein into the plaintiffs' incline, and the plaintiffs say they have the top or apex in their ground. Now it is a part of the statute law of the United States, that these locations shall be upon the top and apex of the vein. The law goes upon the hypothesis that all veins are more or less vertical in the earth. They come up something in this manner — if we suppose this sheet of paper represents the vein, that they extend in some position vertically or somewhat so, to the surface of the earth, and that the end or top of the vein comes up towards or near the surface, and the miner in searching for it will make his location with reference to the end or top which comes up towards the surface; and the plaintiffs say that they did make their location according to the top and apex; that they found it in a certain locality, and inclosed it in their parallelogram; laid out their ground with reference to the top and apex.

Now the law — that being done — gives the miner the whole vein wherever it may go. The law permits him to follow it to any depth, *to any depth*, although in its downward course it may enter the land adjoining. He may go down on the

course of the vein as far as he can pursue it; as far as he can show that it is the same lode or vein he may follow it, however deep it may go, until it becomes, in the nature of things, an impossibility to go any further. You know that at some depths it is impossible to go, because it becomes so warm or other difficulties are encountered which render it impossible to to go further. Now the plaintiff claims that in pursuit of the lode away out to the east of their location the defendants came down upon them and ousted them from the possession, and if that is true, the plaintiffs are entitled to recover, because if the vein originating in their own ground proceeds distinctly and clearly out to the place in controversy, the plaintiffs are entitled to it there as well as in their own surface lines.

Now as to whether it does proceed in that manner, I think the evidence is quite clear, and you will have no difficulty about that. From this point in these first workings of the plaintiffs, as shown on the map, and as has been illustrated upon all the maps which have been put up from that point, the vein extends away down to the Murphy shaft. A large part of the testimony has been directed to that point, and the witnesses have all concurred in saying that the vein extends right along from one point to the other. We used to have some controversy as to whether it could be pursued in that manner, if it declined by only a small degree, only a little from the plane of the horizon. The witnesses stated that it was twelve or fifteen degrees below the plane of the horizon, and it used to be contended here in this court and in other courts of the state that they could not hold the vein if it declined in only a small degree from the plane of the horizon; they said that the law should be applied to veins which are more vertical in their course, but we have heard nothing of that in this case. That point was decided against that view whenever it was made, and we have heard nothing of it in this case; it is not a question in issue, for it has not been raised either by the instructions submitted to me, or requests to charge, or

arguments of counsel. And then there is some reason here as to the extent of the top or apex of the location — assuming that what they claim to be the top and apex is such — there is some question here as to the extent of it along the course of the location from north to south. You will remember the evidence about that drift that runs away off across the map down to the left, down to the northwest — I have sometimes to stop to get these directions myself, although I ought to be very familiar with them — down to the northwest, and which may tend to prove that out in that direction the top or apex of the lode, if there is any, may be down lower below this claim and upon the Iron Hat, or somewhere down there. If that were a question in issue here we should have some difficulty about it, but it is not. As to this particular ground that is in controversy between the plaintiffs and defendants, it is agreed that if there is any top and apex whatever, it is there along where the witnesses have explored the ground, and which they mentioned in their testimony, from along in those first workings to the north of the main incline, and not very far to the north of it. So that the single question which appears to be for your consideration relates to this top or apex, and whether there is any such thing there or not. Upon that point, fearing that I might talk a little at random, as I sometimes do, I have written down what I wish you to consider with reference to it.

The principal question for your consideration is whether the plaintiff has the top and apex of the lode in its location or within the lines of its location extended downward vertically. As presented by the evidence the question is, whether the top and apex of the lode is anywhere exposed, or does in fact lie in plaintiff's ground.

And first we may say, by way of definition, that the top or apex is the end or edge, or terminal point of the lode nearest the surface of the earth. It is not required that it shall be on or near or within any given distance of the surface. If found at any depth, and the locator can define on the surface the

area which will inclose it, the lode may be held by such location. Now whether there is such an end, edge or terminal point of the vein or lode at any depth in plaintiff's ground, is the question to be determined by the evidence. To establish that proposition the plaintiff has given much evidence tending to prove that the ore body terminates at or near the first level north, or the water level spoken of by the witnesses. And that if any ore or vein matter may be found westward from that line, its presence in that locality may be accounted for on the hypothesis that it was brought into that position subsequently to the deposition of the vein and by some disruption and upheaval of the country.

You will readily recall what was said by the witnesses for the plaintiff as to the deposition of the lode matter between the porphyry and lime, while the latter were in some other and probably lower position, and by subsequent upheaval or depression the whole mass was broken into; fragments of which ore is found at the iron claim. In such movement it is said that a new fissure was formed on the face of the infracted limestone into which much of the vein matter would necessarily fall, and thus may be explained the presence of any ore or gangue that may have been found on the western face of the limestone. It is not my purpose to go over the evidence on that point or even to mention the principal points in it. That has been done by the counsel, and you are to consider all that has been brought before you on the subject. But I draw your attention to that theory, and say to you that if the vein or lode was formed in the way supposed, in connection with a much larger extent of the same matter, and this part, detached from another, was brought into its present position by some movement of the country, occurring after the lode was deposited, that circumstance will give it unity and individuality as distinguishing it from every part to the west of it. And if that theory be correct, the occurrence of ore or gangue on the western face of the limestone is not material, for the uplifted part lying on the upper face or plane

of the limestone to the eastward, having been detached from the mass of which it was originally a part, gains by that circumstance a new end or terminal point by which it may be held. In that view the fissure, if any, on the western face of the limestone, occurring after the other in point of time, has a distinct character of its own, and if it carries ore, may be taken and held as a distinct lode.

You understand, gentlemen, that it may be separated from the other, originating at a different time, and thus having a different character, although it connects at the points mentioned by witnesses with the other fissure, it may be regarded as a distinct body in itself, which may be taken as such, if it has anything in it of value.

In that view, if you find that it is sustained by the evidence, the plaintiffs have the top and apex of the lode in their location, and I do not discover any other point which should give you difficulty in arriving at a verdict for the plaintiffs. And generally in support of that view, it should be borne in mind that a fissure on the western face of the limestone descending with the slope of the hill would seem from its position, and may appear from the evidence, to have but little value. And if by taking it in connection with another fissure standing at right angles with it, or nearly, the latter containing valuable ore, we may defeat a location made at the angle formed by both, the evidence should be clear to the point that they are one in origin and growth. In other words, the plaintiff's grantors, having located on a valuable part of the lode, if what lies west of them is very clearly to your minds barren and worthless, before it shall be accepted to defeat plaintiff's location in any of the elements which attach to a proper location, the evidence should clearly establish the connection and unity of the several parts.

We come next to the position assumed by the defendants, to the effect that the lode is continuous from side to side of plaintiff's location, and that the part which plaintiffs claim to be a top or apex is only an upward swell, ridge or high point

in the vein from which it descends in both directions. In support of that view evidence has been given to the effect that the ore was deposited after the tracks had come to their present position, the deposition proceeding practically at the same time and by the same agencies on the upper and eastern face of the limestone, and upon the western face of the limestone as well.

You understand, gentlemen, that there is a difference between these parties as to the time of the upheaval or break; that is, as to whether that occurred before or after the deposition of the mineral.

According to that theory the ore was deposited as it is now found on the eastern and western slopes of the limestone by the same forces and in the same way and at about the same time. I do not go over the evidence in relation to that matter, or mention the principal points in it, but leave you to consider it in connection with that given by the plaintiff touching the origin of this lode. All of this evidence is valuable only as it may enable you to determine whether the lode is continuous from one side to the other of plaintiff's location.

And if it is continuous as suggested, that is to say, if coming in at one side it passes unbroken to the other, the plaintiff cannot follow it beyond the lines of its location. And here you must remember all that has been said concerning the matter of the continuance of the fissure or cavity in which the ore is found. For the ore may be continuous apparently, with a difference in origin of the fissure as to the several parts thereof. But if the fissure existing on both faces of the limestone at the time the ore was deposited, and the latter was deposited as before explained at one and the same time and by the same forces, it ought to be said that it is continuous throughout. And no location can be made on the middle part of a lode, or otherwise than at the top and apex, which will enable the locator to go beyond his line.

I will say to counsel in that case, which is not for the consideration of the jury, that it has always been a question in

my mind whether a location made on the dip of a vein would not be valid as against one of later date higher up. That is to say, whether if a location be made upon the dip of a vein, the locator may not pursue it in the downward course although he may not in the upward course, and may not hold the whole which lies within his location and below it, as against any one locating subsequently at a higher point on the same vein. I admit that that question is presented in this case, but after some consideration, as this is the doctrine generally accepted in this state, I have concluded to adhere to it, and leave the consideration of the question for the supreme court, if there be anything in it.

In that view, if you find the fact to be that the vein has no end or terminal point in the plaintiff's ground, the law is with the defendants. But if you find the top or apex in plaintiff's location, as before defined, the law is with the plaintiff.

Now I have one word further of explanation: the testimony is to the effect that in going down to the westward in those winzes that were sunk down some twenty-seven or thirty feet, there was ore in the bottom, and it was not shown that this continued without the plaintiff's ground, and I think that the defendants' theory is, that if this point reached at the bottom of these winzes was lower than any other within the location, so that in going to the eastward, the general elevation would be upward, that is, taking the direction from both points, the bottom of the winzes and the east side of the location or the general course would be upward, that the plaintiff is thereby defeated. That is not my view of the matter. In my view, if this should be no more than a wave in the limestone and the terminal points of the ore within the plaintiff's location, the plaintiff might select any point as the apex of the vein, from the bottom of the winzes to the highest point which they reach. In other words, the vein must proceed across and without the plaintiff's claim, to the westward, in order to defeat the action upon the ground that the location is in the middle of the vein. Of course, gentlemen, you will remem-

ber the evidence as to the shafts down the hill, and, on that subject, that may be considered in connection with the evidence in regard to these winzes. If you find it is a continuous body of ore, extending from the eastward, over the high point in the limestone and down to the west, beyond the plaintiff's location, it is enough.

The substance of these matters, all that is very important for you to remember, gentlemen, is in this paper, and that you will have in your retirement. There is one here, in the prayers of the defendants that should be given: "If you should find for the plaintiff, in any event, you can only find for them to the extent of the top or apex as developed in the iron claim; and in the verdict that you return, if it should be for the plaintiff, you will state the extent of the lode to which the plaintiff is entitled." I think that was, by the assumption of counsel, in some of their requests that were made, some 316 feet. I suppose there is no objection to that being considered as the extent.

The jury retired, and after a short deliberation returned a verdict for the defendant.

Barrett *v.* Hopkins.

(District of Kansas. January, 1881.)

1. Jurisdiction — Court Martial.— The jurisdiction of a general court martial may always, upon the application of any party aggrieved by its judgment, be inquired into by the civil courts. Courts martial are special tribunals, with jurisdiction limited to a particular class of cases, and if such a court exceeds its authority, its judgment is void, and may be so declared by any court having jurisdiction of the proper parties and of the subject matter.
2. Same — Same — Habeas Corpus.— A circuit court of the United States has jurisdiction to issue the writ of *habeas corpus* to bring up the body of a person imprisoned by the judgment of a court martial, and who alleges that such court has transcended its powers, and to discharge the prisoner if that allegation is found to be true.

3. Soldier — Trial After Expiration of Term of Enlistment.— Where jurisdiction of a court martial has attached, in a particular case, by the commencement of proceedings and the arrest of the accused, it will continue for all the purposes of the trial, judgment and execution. This rule applied to the case of a soldier in the army of the United State, who was arrested for a military offense before the expiration of his term of enlistment, and tried after such term had expired.

Petition for *habeas corpus*.

The petitioner was, on the sixth of September, 1878, an enlisted soldier in the army of the United States, on duty in Wyoming territory, and on that day unlawfully assaulted and shot another soldier; for this offense he was arrested and held in custody, under charges properly preferred, awaiting the appointment and convening of a court martial until the following March, 1879, when he was brought before a court martial, convicted and sentenced to five years' imprisonment in the Kansas penitentiary where he is now confined, in the custody of respondent, as warden, in pursuance of said sentence.

Between the time of the commission of said crime and the prisoner's arrest, and the commencement of his trial, his term of enlistment expired.

He petitions for release from imprisonment upon the ground that the court martial had no jurisdiction to try and convict him after the expiration of his term of enlistment. He avers that at the time of his trial he was a citizen and not a soldier, and therefore entitled to a trial by jury.

Thos. P. Fenlon, for petitioner.

D. G. Swaim, Judge Advocate U. S. A., for respondent.

McCrary, *Circuit Judge*.— 1. Counsel for respondent raises a question as to the jurisdiction of this court, which must be examined *in limine*.

It is insisted that a circuit court of the United States has no power to revise the proceedings of a general court martial, upon *habeas corpus* or otherwise, and that inasmuch as the jurisdiction of the court martial over the case of the prisoner

did once attach, that court had the right to decide all questions arising in the case, including the question now presented, as to its own jurisdiction. The argument of counsel upon this point assumes the soundness of his conclusions upon the main question in controversy. It assumes that the court martial had jurisdiction to try, convict and sentence the prisoner. If this be a correct proposition, it is indeed an end of the case; not because this court is without jurisdiction, but for the reason that having jurisdiction, it ought to sustain the validity of the prisoner's sentence.

I take it to be very clear that the question of the jurisdiction of a general court martial may always, upon the application of any party aggrieved by its judgment, be inquired into by the civil courts. Courts martial are special tribunals, with jurisdiction limited to a particular class of cases. If such a court exceeds its authority and undertakes to try and punish a person not within its jurisdiction, or to punish a person within its jurisdiction for an offense not within its jurisdiction, its judgment is void, and may be so declared by any court having jurisdiction of the proper parties and of the subject matter. The decision of such a tribunal, in a case clearly without its jurisdiction, does not possess that apparent validity which will protect the officer who executes it. "The court and the officers are all trespassers." *Wise* v. *Withers*, 3 Cranch, 331. The rule that civil courts may inquire into the jurisdiction of a court martial in an action by a party aggrieved by its judgment, and give him redress, is settled by the decision of the supreme court of the United States, in *Dynes* v. *Hoover*, 20 How. 82, in these words: "But we repeat, if a court martial has no jurisdiction over the subject matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power over it, civil courts may, on an action by a party aggrieved, inquire into the want of the court's jurisdiction, and give him redress."

It is quite clear that this court has no authority to issue the

writ of *habeas corpus* to bring up the body of a person convicted and sentenced by a court of competent jurisdiction; but it is equally clear that it has jurisdiction to grant the writ and discharge the prisoner, if it appears that an inferior court has transcended its powers. The true line of distinction between the two classes of cases will appear by reference to the following authorities: *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Lange*, 18 Wall. 163, and cases cited; *Ex parte Parks*, 18 Wall. 18.

To say that in this case the court martial had jurisdiction of the prisoner at the time the crime was committed, and therefore retained jurisdiction for the purpose of trying him after his term of enlistment expired, is only to state the main argument in support of the legality of the sentence; it is not to raise a question as to the jurisdiction of this court. I am therefore clearly of the opinion that this court has full power to inquire into the jurisdiction of the court martial, of whose judgment the prisoner complains.

2. That the prisoner was a soldier of the United States army at the time he committed the offense, and that he was lawfully arrested and imprisoned by military authority, and remained lawfully in the custody of the military from September 6, 1878, to February 1, 1879, is admitted. But it is insisted, that on the last named day, he ceased to be a soldier, by the expiration of his five years' term of enlistment, and became a citizen, and therefore, entitled to a trial by jury.

Congress, under its power to make rules for the government of the army and navy, has power to provide for the trial by courts martial of "cases arising in the land or naval forces" (fifth amendment to the constitution). The case of the prisoner clearly arose in the land forces within the meaning of the constitution. He was a private soldier on duty with his command, and he committed an assault upon a fellow soldier. Congress had power, therefore, to confer upon a court martial jurisdiction over the offense. The jurisdiction is plainly conferred by the sixty-second article of war, which provides that

"All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental, garrison or field officers' court martial, according to the nature and degree of the offense, and punished at the discretion of such court." Rev. Statutes U. S. p. 235.

The proceedings against the prisoner having been instituted while he was clearly within the jurisdiction of the military authority, by the preferring of the charges and by his arrest, as well as by the forwarding of the charges to headquarters, with an application for the appointment of a court martial for his trial, the question for determination is, did that jurisdiction cease and expire at the end of the prisoner's term of enlistment, so that all proceedings after that date were void?

The general rule is, that when the jurisdiction of a court attaches in a particular case by the commencement of proceedings and the arrest of the accused, it will continue for all the purposes of the trial, judgment and execution. This rule has long been recognized by the war department as applicable to cases properly instituted before a legally constituted military court martial, and in which, before the conclusion of proceedings, the term of enlistment of the accused expires. (Winthrope's Dig. Opinions of Judge Advocate General, 1880, page 210.) The general rule is grounded in sound reason. Many of the gravest military offenses are not cognizable by the courts of common law. A soldier might be guilty, on the eve of the expiration of his term of enlistment, of the grossest insult to his officers, or of disobedience of orders, or of desertion in the face of an enemy, and if he could not be held for trial after the end of his term, he would escape punishment altogether. To hold that in every such case the jurisdiction of a court martial would cease with the expiration of the term of enlistment would be to shield the guilty from punishment, to encourage crime and to greatly demoralize the military

service. The jurisdiction, therefore, in such cases, is to be maintained upon the highest consideration of public policy.

But such considerations are not alone sufficient to support the jurisdiction of a court which has power to deal with life, liberty and property. The jurisdiction of a criminal court must rest upon sound principles of law, and not merely upon considerations of public interest and convenience.

It frequently happens that the guilty go acquit because there is no lawful mode of trial and punishment provided. The jurisdiction in the cases named, and in many others of like character, must therefore be upheld upon the ground first mentioned, to wit: That the court martial acquired it by the proper commencement of proceedings, and could not be divested of it by any subsequent change in the status of the accused; and this reason applies as well to a case where the crime is one known to the common or statute law, as to one in which the offense is purely military.

In both the jurisdiction is maintained after the end of the term of enlistment upon the same ground.

This conclusion is supported by judicial interpretation, in the only cases, so far as I know, in which the question has arisen. *United States* v. *Travers*, 2 Wheeler, C. C. 509; *In re Dew*, 25 L. R. 540; *In re Bird*, 2 Sawyer, 33; *In re Walker*, 3 Am. Jurist, 281.

What I have said is conclusive of the case, and it is therefore not necessary to consider the question whether the term of enlistment of a soldier in the army is for five years, or five years and until discharged. In either case the prisoner must be remanded to the custody of the warden to abide the sentence of the court martial.

So ordered.

Burdick *v.* Peterson.

(District of Iowa. October, 1880.)

1. Removal — Intervenor — Time of Application.— Where, after the suit was brought, and had been for some time pending, but, before trial, T. became the owner of the property in controversy in an action of ejectment, and applied to the court for leave to intervene and be substituted in the place of the original defendant, which application was granted — *held*, that the right of the intervenor to remove this cause into the United States court, on the ground of citizenship, accrued at the time of his intervention, and a petition for removal filed simultaneously with the intervening petition was in time.
2. Removal Acts — Intervenor Entitled to their Benefits.— The removal acts apply to all *bona fide* litigants in the state courts, whether made parties originally or not, and whether plaintiffs, defendants or intervenors.

On motion to remand.

Action of ejectment instituted in February, 1876, by the plaintiff, C. W. Burdick, against the defendant, John Peterson, in the district court of Winneshiek county, Iowa. The defendant appeared in the state court, and pleaded the general issue and the statute of limitations.

The cause was by the state court continued at the February term, 1876; at the June term, 1876; at the October term, 1876; at the February term, 1877; and at the June term, 1877.

At the October term, 1877, George O. Tollman had leave to file petition of intervention, whereby he alleged that he was the owner in fee simple of the land in controversy, having, after the commencement of this suit, purchased the same at master's sale, under a decree of foreclosure. He avers that, under said decree and sale, he was placed in possession of the land by the marshal, and defendant Peterson ejected therefrom about September 1, 1877. The petition of intervention alleged in substance that all the interest and the possession of the original defendant, Peterson, had, by virtue of the foreclosure and sale, passed to the purchaser, leaving Peterson thereafter a nominal party only. The petition of intervention

was filed October 23, 1877. On the same day the intervenor, Tollman, filed his petition for removal of cause to circuit court of the United States. The petition is in the usual form, except that it avers the citizenship of the parties in the present tense.

The removal was on the same day ordered by the state court.

At the May term, 1880, of this court the cause was tried, and resulted in a verdict for the defendant. A motion to set aside verdict and for a new trial was afterwards made by plaintiff, and is still pending. More recently a motion was made by the plaintiff to set aside the judgment and remand the cause to the state court, upon the ground that "said judgment is void for want of jurisdiction in the court, the cause having been removed from the state court, and it nowhere appearing that at the commencement of the suit the citizenship of the parties thereto was such as to authorize the removal thereof and confer jurisdiction upon this court."

Wright, Gatch & Wright, for the motion.

Chas. A. Clarke, contra.

McCrary, *Circuit Judge.*—This court has several times held that the petition for removal or the record of the cause in the state court under the act of 1875, must show the citizenship of the parties at the time of the commencement of the suit.

Assuming the correctness of that general rule, we are to inquire how does it affect this case?

The removal here was upon the petition of Tollman, the intervenor, who became the owner of all the interest of the original defendant by a purchase at judicial sale, made after this suit was brought, and had been for some time pending, but before trial. The petition for removal was filed simultaneously with the petition of intervention, and the allegation is, that the intervenor was a citizen of New York at the time

of filing the petition, or in other words, at the time he became a party to the suit. Of course his citizenship before he became a party is unimportant so far as this question is concerned. If he had the right to remove at all, it was manifestly sufficient to aver the citizenship of the parties at the time that right accrued — that is to say, at the time he became a party to the suit. The only question to be considered, therefore, is, whether a party who in good faith becomes the owner of property pending a litigation concerning the title thereto in a state court, and who by proper means makes himself a party to the cause in such court before trial, is entitled to the benefits of the provisions of the act of March 3, 1875, relating to the removal of causes.

In other words, if such a party be a non-resident of the state, has he, when coming into the case by intervention, the same right of removal that he would have had if originally a party plaintiff or defendant?

The statute provides, that in any suit of a civil nature brought in any state court, involving over $500, in which there shall be a controversy between citizens of different states, "either party may remove said suit into the circuit court of the United States," etc. (Sec. 2, act March 3, 1875.)

Can we with propriety limit the application of the words "either party" to the original plaintiff and defendant?

I think not. The act applies to all *bona fide* litigants in the state courts, whether made parties originally or not. "Either party," whether plaintiff, defendant or intervenor, may remove a cause by showing the necessary facts. It follows from this that, as to an intervenor it is enough to show the citizenship of the parties at the time of his intervention, for as to him that is the commencement or bringing of the suit. But the above cited section of the act of 1875 further provides, that when, in any suit mentioned in the section, "there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or de-

fendants, actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district."

This clause very clearly applies to a controversy between the original plaintiff and an intervenor who may be brought in in the course of the litigation and before trial. It is enough if the controversy described is in the suit; there is no requirement that it shall be between original parties. The intervenor became a defendant within the meaning of this clause, and since there was very clearly a controversy between him and the plaintiff, in which the original defendant had no interest, and which could be fully determined as between them, the right of removal existed.

If the petition for removal had not been filed until after the intervention, it would, upon the principle of the cases heretofore decided by this court, have been necessary to aver the citizenship of the parties at the time of intervention, but inasmuch as the petition to intervene and the petition for removal were filed at one and the same time, I am of the opinion that the use of the present tense in the latter was sufficient. It is not necessary to determine whether the motion is in time (having been made after judgment), since, independently of that question, it must be overruled.

So ordered.

THE FRANK G. & S. M. Co. *v.* THE LARIMER M. & S. Co.

(District of Colorado. April, 1880.)

1. REMOVAL OF CAUSE FROM STATE COURT — CASES ARISING UNDER THE LAWS OF THE UNITED STATES. — Actions upon an adverse proceeding to prevent the issuance of patent for a mining claim are cases arising under the laws of the United States, and may be removed from the state to the United States courts for trial.

Wells, Smith & Macon, for plaintiff.

T. A. Green, for defendant.

MILLER, *Circuit Justice.* The defendant made application for patent for a mining claim in Lake county, to resist which plaintiff filed in the land office an adverse claim, and thereupon filed complaint in the district court for Lake county.

Defendant, after answer, filed a petition for a removal of the cause to the circuit court of the United States, on the ground that the subject matter of the action arises under the laws of the United States, and the case was removed accordingly.

This hearing is of a motion to remand the cause to the state court for trial. The act of congress of March 3, 1875, provides that the "United States circuit courts shall have original jurisdiction of the subject matter of all cases arising under the constitution and laws of the United States." It is impossible that such an action as this can be determined without reference to, and involving a construction of the mining laws of congress. The questions involved necessarily arise under the laws of the United States; and hence, this court has original jurisdiction of the subject matter of the action, and the case was properly removable. The motion to remand must be denied.

CROSSMAN *et al. v.* PENDERY *et al.*

(District of Colorado. April, 1881.)

1. MINING CLAIM—POSSESSION BEFORE DISCOVERY OF MINERAL IN PLACE.—The prospector upon the public domain can hold to the extent of his claim in actual possession prior to the discovery of mineral in place; but if he stand by and permit another to sink a shaft within his boundaries, and the latter first discovers mineral, his will be the better claim.

T. A. Green, for plaintiffs.

Wm. Harrison, for defendants.

MILLER, *Circuit Justice.* This cause is submitted upon an agreed state of facts, to the effect that the ground in contro-

versy is covered by the surface lines of the Orion claim, located by plaintiff, and also of the Pendery claim, located by defendant; that both locations are regular as to form; that the Orion was first located, surveyed and staked; that the locators have steadily prosecuted work in the development thereof, and have discovered mineral in place; that the discoverers of the Pendery located subsequently to the Orion, and while the locators of the latter were in possession thereof, also prosecuted work and discovered mineral in place before the discovery by the locators of the Orion. The question submitted to the court is this: Can prospectors on the public mineral domain acquire any right in which the law will protect them, prior to the discovery of mineral in rock in place? And if so, can plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the land in controversy?

It is the opinion of the court, that inasmuch as the plaintiffs allowed the defendants to enter upon their claim and within their boundaries, and there to sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and to make location thereof without protest, the defendants now have the better right. But the plaintiffs might have protected their actual possession of their entire claim by proper legal proceeding prior to the discovery of mineral by the defendants, or by either party.

A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His possession so held is good as a possessory title against all the world, except the government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such first discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail, and in this case judgment must be for the defendants.

ERHARDT *et al. v.* BOARO *et al.*

(District of Colorado. June, 1881.)

1. MINING CLAIM — DISCOVERY STAKE — POSSESSION.— The statute of Colorado, which gives sixty days after the discovery of a mining claim in which to sink a discovery shaft and make location, does not require the discoverer to remain, during that interval, in actual personal possession by being present upon the ground. The erection of the discovery stake, with the required notice thereon, is notice to all others of the claim of the discoverer, and amounts to constructive possession, which is sufficient during the period provided by the statute.
2. ASSESSMENT WORK — INTIMIDATION.— That the discoverer is prevented from doing assessment work within prescribed time, by intimidation on the part of an adverse claimant, is sufficient excuse, and will not deprive him of his right to locate the claim.

M. B. Carpenter, Wells Smith & Macon, for plaintiffs.

Markham, Patterson, Thomas & Campbell, for defendants.

MILLER, *Circuit Justice.*— Plaintiffs, while prospecting on the public domain, discovered mineral within about two feet of the surface of the ground, and on the seventeenth day of June, set up their discovery stake, containing the name of the lode — Hawk — the date of the discovery, the name of the discoverers and the other matters substantially as required by law. On the thirtieth day of June, thirteen days thereafter, the defendants pulled up the stake so set by the plaintiffs, threw it away, entered into possession and went to work in the same hole, and having sunk the shaft to the required depth, made a location of the claim.

Plaintiffs brought their action at law for the possession, alleging that they were the discoverers thereof, had planted their discovery stake, and within the sixty days allowed by law in which to complete the sinking of their prospect shaft and make their formal location, the defendants wrongfully entered and hold the claim; and plaintiffs seek an injunction in aid of their action at law, to restrain the defendants from working the claim and removing ore therefrom The affidavits filed in support of the motion for injunction show that in consequence of threats made by defendants, plaintiffs were deterred from

entering on the claim and prosecuting the development work within the time required, and that, though they procured a survey to be made upon which to make out a location certificate, this was done secretly, by the officer who made the survey for defendants. It is claimed for defendants that the plaintiffs were not in actual possession of the claim between the seventeenth day of June, the time they set their stake, and the thirtieth of June, when defendants entered; and further, that the notice upon the discovery stake of plaintiffs was not sufficient, in that it failed to give the course of the lode.

The law of the state gives sixty days after making discovery of mineral, in which to sink a shaft ten feet in depth. The main object of the sixty days' possession, it seems to the court, must be to allow time to discover the course of the lode in order that the location may be made thereon. Counsel for defendants made an ingenious argument to show that the locator during those sixty days, to hold his right, must remain in continuous actual possession of the ground. The court does not so hold. If the discoverer put up a stake at the discovery, giving the name of the lode, date of discovery and notice of his intention to locate the claim, this is equivalent to actual possession. Otherwise the statute serves no useful purpose. The intention of the statute must be that the setting up of the discovery stake with the notice thereon as required is equivalent to actual possession for the sixty days, within which he may proceed to the next step, to wit: Sink the discovery shaft to the depth of ten feet, have survey made, mark the lines and make formal location.

That the plaintiffs did not sink the shaft to the required depth of ten feet within the sixty days cannot prejudice their right in this case, for the reason that the defendants prevented them from so doing by taking possession of their excavation. Plaintiffs could not prosecute their work while the defendants were in the occupancy, and this is sufficient reason for not sinking the shaft within the time prescribed. The injunction will be awarded.

MARION COUNTY *v.* MCINTYRE.

(District of Nebraska. May, 1880.)

1. COUNTY — RIGHT OF, TO SUE IN FEDERAL COURT OF ANOTHER STATE.— An organized county in the state of Iowa, having the right to sue and be sued, etc., under the laws of that state, may commence and maintain a suit in this court to recover property or its value, of which it has been wrongfully deprived.
2. MONEY DEPOSITED WITH AN INDIVIDUAL AS INDEMNITY — WHEN RECOVERED BACK.— Money deposited with an individual for a specific purpose, to wit: To indemnify him against loss or liability on an appearance bond in a criminal case, can be recovered back after the liability has ceased on such bond, and such a deposit can in no sense be regarded as a *payment* by the county.

DUNDY, *District Judge.*— In the month of October, 1876, the treasury of Marion county was robbed of about ten thousand dollars in money, and the thieves were, for a time, successful in secreting as they had been in securing the money. For the purpose of securing the arrest and conviction of the robbers, the county offered a respectable reward for their apprehension. Two enterprising individuals of the state of Iowa, by name, Charles B. Thompson and James E. Hetherington, after gaining such information as seemed to be within reach, started in pursuit of the thieves and their plunder.

The alleged thieves were successfully followed into the interior of this state, where they were "shadowed" by their pursuers, and where they were finally arrested by Thompson and Hetherington, who had been employed for the purpose. A portion of the stolen funds were recovered, the same having been found in the possession and on the person of one of the thieves. One of the original packages stolen contained the sum of two thousand dollars, and was taken from the thief by his captors before the package had been broken or opened. This package was retained by Thompson and Hetherington for a time and until it was by them delivered to this defendant. But whilst this business was progressing, the thieves, their accomplices or friends, incredible as it may seem, actu-

ally had Thompson and Hetherington arrested for robbery, the charge being for taking the stolen funds from the thieves, who had the same in possession. And, what is absolutely amazing, the magistrate, before whom Thompson and Hetherington were taken, required them to give bail to answer in the district court to the charge of robbery. The bail required was fourteen or fifteen hundred dollars, and without the use of the money captured, the accused were unable to give it. At this stage of the proceedings this defendant first appears in this serious, and what seemed to be a rather dangerous and inconvenient farce. This, however, let it be said, was not at all discreditable to him. Negotiations between this defendant and Thompson and Hetherington led to an agreement which resulted in McIntyre executing a bond for the appearance of Thompson and Hetherington at the then next term of the district court, there to answer to the said charge of robbery.

The two thousand dollar package of money taken from the thieves was placed in the hands of this defendant, to be held by him as security against any loss he might sustain in consequence of his becoming surety for Thompson and Hetherington. This unbroken two thousand dollar package, however, was desired by the proper authorities in Iowa, to use in prosecuting the thieves; and it was understood and agreed between the parties at the time, that McIntyre was to surrender to the county the said unbroken package as soon as the county should place in his hands the sum of fifteen hundred dollars, which was to indemnify him against loss, if Thompson and Hetherington failed to appear in court and answer to the said charge of robbery. The county subsequently placed in the hands of the defendant the fifteen hundred dollars, and the defendant surrendered the two thousand dollar package, according to agreement. Subsequently the said Thompson and Hetherington appeared in the district court, as they were required to do by their bond, and the grand jury of the county ignored the charge — the district attorney of the district, to his honor be it said, declining to prosecute in such a comtempt-

ible case. This put an end to the bond which the defendant had signed, and his obligations thereon were fully discharged. The defendant then had no further risk to run. His further connection with the criminal charge of robbery, and the execution of the bond for the appearance of the accused, was absolutely at an end. He could have surrendered the money to the plaintiff without danger of further liability, except as hereinafter stated. After all this and after the defendant had notice of the ignoring of the charge of robbery against Thompson and Hetherington, the plaintiff demanded of the defendant the surrender of the money placed in his hands for the purpose aforesaid. Before this demand was made, however, it seems that several parties in this state had commenced suit against Marion county, for alleged damages done to horses whilst in pursuit of the thieves and robbers who had plundered its treasury. Judgments were in *some* way entered in several of these peculiar cases, and the money was attached in the hands of this defendant to satisfy such claims.

The plaintiff gave the defendant credit for the sums so attached, and requested payment of the balance, which was refused, and this suit was brought to compel payment of the balance due. The defense was:

First. That the plaintiff had not the legal capacity to commence and maintain the suit.

Second. That the money placed in the hands of the defendant, to wit: the $1,500, did not belong to the plaintiff; and

Third. Even if it did belong to the plaintiff, there was no authority for placing it in the hands of the defendant for any such purpose, and *therefore* no recovery could be had.

Trial was had on the issues joined, which resulted in a verdict for the plaintiff of $1,537.10.

The defendant seeks to have the judgment of the court arrested, for the same reasons relied on as matters of defense.

Marion county is one of the political subdivisions of the state of Iowa. The county was duly created by an act of the legislature of the state of Iowa, and has been organized and

transacting the business pertaining to its organization for many years past. Under the laws of the state in which it is located, it can sue and be sued, and do many other things, as well as individuals. This is necessary for the well being, if not for the very existence of a municipal corporation. And the several counties in Iowa, and in fact most, if not all counties in other states, possess the same rights. It is believed that authority is conferred on all of them to acquire and hold property for the convenient transaction of their lawful business. We know that it is necessary for all of them to levy and collect taxes, to furnish funds to carry on the financial affairs of the counties. All are invested with this authority. None can exist without it, and none have existed without in some way raising a revenue to meet the necessary expenses incident to the organization. This principle is universally recognized and applied. And because of this necessity, counties have conferred on them the right to sue and be sued, so that their money and other property can be fully protected. Without such a right to protect the public property, without the right to resort to the courts to correct an abuse or redress a wrong or maintain a right, the power and right to acquire and hold property, however useful or necessary, would be but an empty shadow. Were it otherwise, a county would be at the mercy of every scoundrel who would spoliate its treasury or embezzle its property, and get across the lines of a state before being apprehended. Can it be said that a thief who steals the money or property of one of the counties in Iowa, Missouri or Kansas, or any other state, shall find a safe place to enjoy his stolen property, if he can succeed in crossing the Missouri river with it, and finding a place in this state where he is out of reach of process, and where the same could not be recovered back, for the alleged reason that a county cannot maintain a suit? I have seen no authorities that go to that extent, and I shall not be the first to announce such a doctrine. I will do nothing that would have such a direct tendency to convert this state into a place of sanctuary for thieves, robbers and embezzlers

of public property. Of course, it is not intended to apply this language to the defendant, but it shows the direct tendency and the inevitable result, if the principle contended for by the defendant's counsel should be reduced to practice. Few, if any cases of this sort can be found. In fact, the necessity for them can but seldom arise in a law abiding community. And had there been a healthy public sentiment in the neighborhood where the parties who robbed the treasury of the plaintiff were arrested, there would have been no occasion for bringing this suit.

But the defendant insists that no recovery can be had here, for the alleged reason that the plaintiff had no right to place money in his hands for any such a purpose; that no such a payment could be made by the plaintiff and a liability be created thereby. We must bear in mind that the money belonging to the plaintiff was stolen; that it had passed beyond the reach and control of the plaintiff and its officers, without the consent or fault of either, and had found its way into the hands of other parties, where nothing but legal process could reach it. The two thousand dollar package had been placed in the hands of the defendant, without the knowledge and consent of the officers of Marion county, who had the lawful right to control it. That package was undeniably the property of the plaintiff. The possession thereof by the plaintiff, or its officers, seemed indispensable in the prosecution of the robbers. McIntyre had the package of money. He was out of reach of process issued by the Iowa courts. He was not willing to surrender the money until the plaintiff would deposit with him $1,500 in lieu thereof, to indemnify him against loss which might arise from his going on the bond of Thompson and Hetherington. This was done by the plaintiff, and afterwards the defendant was fully discharged from his liability on the bond. After that, he paid out a part of the money on suits against the county or its agents, and the defendant received credit therefor. He received the money from the county or its representatives, to indemnify him against loss.

He lost nothing, and as the money was placed in his hands to hold simply until he should be discharged on the appearance bond, it cannot, in any sense, be regarded as a payment out of the public money of the plaintiff, as claimed by the defendant. When he was released from liability on the bond, he ought to have paid back the money. He did not do so. And finally, when appealed to by the representatives of the county, he positively refused to do so, for reasons stated in the answer. This is not as it should be. It is positively wrong. And when there is a wrong, there is usually a corresponding remedy. When there is a remedy, a court will not long hesitate about its application.

I have found no reported case, nor have I read or seen anything in the laws of man, nor have I read or seen or heard of anything in the laws of God that will prevent a recovery in a case like this. Reason, justice, equity, *law*, common sense and fair dealing, all unite in demanding a restoration of this money to the plaintiff, of which it was at first wickedly and feloniously deprived, and from which it has been long improperly and unlawfully withheld.

I conclude, that justice has been already too long delayed, and that it must be no longer impeded or interrupted.

The motion in arrest of judgment, therefore, must be overruled.

Judgment for the plaintiff on the verdict, for $1,537.10.

DILLON, *Circuit Judge*, took no part in deciding this case.

OGILVIE *v.* CRAWFORD COUNTY.

(District of Iowa. May, 1881.)

1. TAXES ON PROPERTY IN TRANSIT THROUGH THE STATE.— A state cannot levy a tax upon property in transit to other states or countries. Such property has no *situs* in the state in the proper legal sense of that word.
2. SAME — PROPERTY IN COMMERCIAL TRANSIT.— Where a party purchased

corn from various parties, caused it to be removed to the railway and there to be put in cribs temporarily to await transportation, and with the purpose on his part to have it carried beyond the state: *Held*, that it was in commercial transit, and not taxable by the state. But there must be a purpose to ship immediately, or as soon as transportation can be convienently obtained, followed up by actual shipment in a reasonable time.

3. SAME — CRIBBING OF CORN. — With the qualification above stated, the cribbing of corn may be treated as a thing done from necessity or for convenience in the course of transportation.

LOVE, *District Judge.* — This case is before the court on demurrer to the petition. The petition alleges that the plaintiff, who is a citizen of Canada, had on January 1, 1879, certain cribs of corn which had been purchased in Crawford county, Iowa, for the purpose of shipment to Canada; that said corn had been moved by the plaintiff from its places of production toward its destination beyond the state, and temporarily placed in cribs; that it was in cribs awaiting shipment by the Chicago and Northwestern Railway, on the first day of January, 1879; that the plaintiff's intention was at all times to move said corn in bulk beyond the state, and not to sell or manufacture the same within the state of Iowa; and that the corn has since been removed in bulk out of the state, no part of the same having been sold, used or manufactured therein.

It is alleged further that while the corn was so temporarily in cribs, it was assessed as property of a non-resident, a tax upon the same levied and a warrant issued to the sheriff, whereby the plaintiff was compelled, in order to save his property, to pay the taxes levied as aforesaid.

There is a second count stating different circumstances, but presenting the same question.

The petition prays judgment for the amount of taxes paid, amounting to $502.22, with interest.

The question thus presented is, whether or not the property taxed was on the first day of January, 1879, when it was assessed for taxation, in the course of transportation from the state of Iowa, to any other state or country, as an article of commerce? In a word, was it in commercial transit?

That a state cannot levy a tax upon property in transit to other states and countries is clear; because the property then has no *situs* in the state in the proper legal sense of that word. It would be a most serious evil and a direct obstruction to interstate commerce for any state to exercise the power of taxing property while in commercial transit to other states or countries.

The question then is, was the property in commercial transit? The petition is not as clear and explicit as it might be, but the fair construction of it is, that the plaintiff, having purchased the corn from various parties, caused it to be removed to the railway and there put in cribs temporarily to await transportation, and with the purpose on his part to have it carried beyond the state.

This allegation of intention is essential, because otherwise a purchaser might crib his corn on a railway, with no purpose of immediate shipment, but for the purpose of awaiting the future course of the markets, or with intent to evade taxation, in which cases the transit would, in my opinion, be treated as at an end for the time being at least. If this were not so, a party might keep his property in cribs near a railroad for an indefinite period of time, exempt from taxation, without any purpose of immediate shipment.

There must be, in my judgment, a purpose to ship immediately, or at least as soon as transportation can be conveniently obtained, followed up by actual shipment in a reasonable time, in order to exempt the property from taxation.

With this qualification, the cribbing of the corn may be treated as a thing done from necessity or for convenience in the course of transportation.

It certainly would be unreasonable to require that a party, in order to bring himself within the protection of the law as a shipper *in transitu*, should transfer the corn directly from his wagons to the cars, or place it upon the ground, to be thence transferred to the cars; and this he would be compelled to do, unless he may place it in cribs or store it temporarily in ware-

houses, to await the means of shipment in the ordinary course of transportation.

It would seriously cripple and obstruct commerce in the productions of this state, and thus inflict a great injury upon our own people, if a purchaser could not temporarily deposit the property purchased in cribs or warehouses, to await the means of transportation.

I have examined the cases cited by the defendant's counsel, and I cannot see that any of them touch this case at all except *Carrier* v. *Gordon*, reported in 21 Ohio, 605.

That case is similar to the present, but clearly distinguishable from it; indeed, if the language of the court in deciding it be well considered, the reason of the case supports our judgment in the present case.

In *Carrier* v. *Gordon*, the property purchased had not been moved at all by the purchaser. It remained at the place of purchase and could not, without the utmost violence to language, be said to have been in the course of transportation. Indeed the averment was not that the property was in transit, but that the plaintiff intended to remove it from the state upon the opening of navigation, etc. In delivering the opinion the court say:

"It is true that in order to constitute it property in the state, within the meaning of the law, it must have a *situs* in the state. If it is at the time the tax attaches *in transitu*, either through the state or from a point in the state to a point outside the state, it is not to be regarded as property in the state within the meaning of the statute, but as property belonging to the place of its destination. But such was not the situation of this property at the time it was returned for taxation. There is nothing in the plaintiff's petition to show that the plaintiff's timber had in any sense started on its journey, or had been removed from the place or places where it had been purchased."

"To say that the simple purchase of the property, with an intention to remove it, would relieve it from liability to tax-

ation, would be to make its liability depend upon the mere intention of the owner," etc.

We see nothing to object to in the doctrine of the Ohio court in this case. It seems to us to be entirely in harmony with our own judgment in the present case.

Demurrer overruled.

HUTHSING *v.* BOUSQUET *et al.*

(District of Iowa. May, 1881.)

1. REWARD FOR APPREHENSION OF CRIMINALS — OFFER BY COUNTY OFFICIALS.— An offer of a reward for the apprehension and conviction of the parties guilty of robbing a county treasury, signed by order of the board of supervisors, by the chairman thereof, is not the act of the individual members of the board for which they are individually and personally liable, but is an act done by them in their official capacity only.
2. SAME — OFFER WITHOUT AUTHORITY UNDER MISTAKE OF LAW.— Where such an offer of reward was made by the board of supervisors, without authority, and acted upon by the plaintiffs, all parties supposing the board had such authority, the fact that they had in law no authority does not make them personally liable.

LOVE, *District Judge.*— This is an action to recover the sum of $5,000, which the defendants, who were members of the board of supervisors of Marion county, offered as a reward for the apprehension and conviction of the robbers of the treasury of that county.

The question is before us upon a demurrer to the petition. The plaintiff claims to recover upon two grounds.

First. That the defendants offered the reward as individuals and not in their official capacity as supervisors, and that consequently the contract upon which the plaintiff counts is a personal contract, binding upon the defendants as individuals.

Second. That if the defendants assumed to bind the county of Marion by the offer of the reward in question, they transcended their authority as supervisors, and therefore, by the

laws of agency, became themselves personally bound to perform the contract.

The action cannot, in our judgment, be maintained on the first ground, because the undertaking, as set out in the petition, does not admit of the construction that it was the intention of the parties that the defendants should be personally bound to pay the offered reward.

It is perfectly clear that the offer was made by the defendants in their official capacity, and that it must have been so understood by both parties.

The averments of the petition are: "That the defendants were the legally elected and acting board of supervisors of Marion county; that, on the 10th of October, the defendants, assuming to act for said county, but without authority, caused to be published and circulated a certain circular letter in the following words:"

"*Marion County Treasury Robbery.*

"On Thursday, the tenth day of October, 1876, at 7 o'clock P. M., the treasury of Marion county was robbed of about $12,000. The deed was committed by two men with black velvet masks, etc. (Here follows a description of the men.) Five thousand dollars for the arrest and conviction of the thieves. Five thousand dollars additional reward will be paid for the recovery of the money.

"By order of the board of supervisors.

"H. D. Lucas, *Chairman.*"

There is no ambiguity in this paper. There is nothing in it open to interpretation. It purports to be not the act of the individual members of the board. It is signed by the defendant as chairman of the board of supervisors, and in express terms, "by order of the board of supervisors."

The offered reward related to a public, not a private matter. These defendants had no more interest, as mere individuals, in the arrest and conviction of the offenders than any other citizen.

How is it possible that the plaintiffs could have misunderstood the offer as a proposition of mere individual citizens to make themselves personally responsible for so large a sum, in the face of express terms, showing that they were acting by order of the board of supervisors, and therefore as mere representatives of the board?

What possible terms could these defendants have used to show more explicitly that they made the offer in their representative capacity as public officers, than the words they did use, "by order of the board of supervisors?"

No averment in pleading can change the purport of these words, and the court cannot by construction do violence to their plain meaning. The plaintiff could not have understood that the defendant, Lucas, in signing the paper as chairman and by order of the board, meant what he did not say, namely, that he offered the reward without the order of the board and as an individual upon his personal responsibility.

The intention of the parties to this contract is not to be mistaken, and its construction must follow the intention.

The decisions of the supreme court of Iowa, to the effect that the board of supervisors have no authority to offer such a reward, had not been made when the reward was offered and acted upon. Both parties doubtless acted under a mistake of law. It was very natural that they should both suppose that the authority existed in the board to make the offer, and they no doubt both intended that the county of Marion should be bound by it. Having made the contract with this intent, the plaintiff cannot now convert it into a contract with the defendants personally.

The plaintiff cannot make a contract with one party and count upon it in pleading as a contract with another and different party. *Hawk* v. *Marion County*, 48 Iowa, 472; *Hanger* v. *City of Des Moines*, Runnels, 42. Can the action be maintained upon the second ground stated above?

It is clear that the second ground, like the first, is untenable.

When an agent makes a contract in the name of his principal, but without authority, he binds himself, for the reason that if he (the agent) is not bound, there is no one to respond to the third contracting party. If in such case the agent were not bound, his act in representing himself to have authority would operate as a fraud upon the other contracting party. But if in such case the agent were to tell the third contracting party that he had no authority to bind the principal, it would be the folly of the other contracting party to enter into such a contract, and he could not claim to be defrauded. Neither could he count upon a contract against the agent, because that would be contrary to the very terms and the manifest intent of the contract.

He would have to lie on the bed which he had made for himself with his eyes open. The law does not aim to relieve a party against the consequences of his own folly.

The case before us stands upon this principle. The board of supervisors had no authority by law to make the contract on which the plaintiff relies in this action. The plaintiff was bound to know the law, and we must proceed therefore upon the assumption that he did, when he accepted the offer and performed the service, know that the board had no authority to offer the reward. The offer was *ultra vires;* the plaintiff knew it; it was his own folly to accept such an offer; he cannot claim that he was misled or deceived; and the court cannot relieve him. It has been frequently decided in this and other states, that where a public officer makes a contract *ultra vires*, the party contracting with him cannot hold the public officer responsible as an agent, acting without authority.

This doctrine has been laid down upon the express ground of the third contracting party's knowledge, when entering into the contract, of the public agent's want of authority. *McCurdy* v. *Rogers*, 21 Wisconsin, 197; *Richard* v. *Warren County*, 31 Iowa, 389; *Boardman* v. *Hayne*, 29 Iowa, 339.

In the great County Bond litigation which lately agitated the courts of this state, it was never claimed that the county

officers who had, as decided by the supreme court of Iowa, acted *ultra vires* in issuing the bonds, were themselves personally liable as agents contracting without authority.

It has been suggested that the defendants offered the reward without any formal meeting and resolution of the board authorizing it. This would be material if there had been any statutory authority empowering the board at a regular or called session to offer the reward in question, but since if at an authorized session a resolution of the board offering the reward would have been utterly without authority and void, it can make no kind of difference that the defendants acted without such formal meeting and authority.

If there had been statutory authority, and the defendants had acted in offering the reward without actual authority conferred by the board, the plaintiff could charge them upon the contract as agents acting without or transcending their authority, because in that case the want of authority depending on a matter of fact, not law, notice of the absence of power to make the contract could not be imputed to the plaintiff.

Demurrer sustained.

WALSH and others v. MEMPHIS, CARTHAGE & NORTHWESTERN RAILROAD COMPANY and others.

(*Eastern District of Missouri.* March, 1881.)

1. JOINDER OF PARTIES. — A corporation is a necessary party defendant to a bill to enforce a judgment against it by compelling contribution from its stockholders.
2. SAME. — All the stockholders are also proper parties in such a suit, if they apply to be heard.
3. JURISDICTION — WHEN SUIT IS NOT WHOLLY BETWEEN CITIZENS OF DIFFERENT STATES. — If A. and C. are citizens of the same state, and B., C. and D. are citizens of different states, a suit in which A. and B. are plaintiffs and C. and D. defendants, and in which they are all necessary parties, is not one over which a United States court will take jurisdiction,

on the ground that the controversy is "between citizens of different states." To give a United States court jurisdiction on that ground, the controversy must be wholly between citizens of different states.

In equity. Motion to remand.

This was a suit in equity to enforce certain judgments against the Memphis, Carthage & Northwestern Railroad Company, by compelling contribution from holders of unpaid stock, and for other purposes. It was originally commenced in the circuit court of the city of St. Louis, in the state of Missouri, by George W. Walsh, Union Savings Association, a corporation, William Lee, Joseph Shippen, Edward Burges, James J. Marks and Hiram Driggs, citizens of the state of Missouri, H. R. Beers, A. M. Jay, S. M. Sovern, S. Pitzer, J. F. Pitzer and Alfred Palmer, citizens of the state of Kansas, against Joseph Seligman, James Seligman, Jesse Seligman, John A. Stewart, J. M. Brown and James M. Hyde, citizens of the state of New York, Memphis, Carthage & Northwestern Railroad Company, St. Louis & San Francisco Railroad Company, A. A. Talmage, C. W. Rogers, W. J. Tower, Ezra Miller and James Baker, citizens of Missouri, and R. W. Wright, a citizen of Kansas. The petition for removal was made by defendant Jesse Seligman alone, and set forth that he was a citizen of the state of New York; that the controversy was wholly between citizens of different states; that the whole matter in controversy was as to the liability of the petitioner and his co-defendants, Joseph and James Seligman, and that the other defendants were only nominal parties.

Motion was made to remand upon the following grounds, viz.: (1) Because only one of the defendants, Jesse Seligman, petitioned for the removal, and because the suit was not one in which there could be a final determination of the controversy, as far as concerned him, without the presence of the other defendants; (2) because the controversy in the suit was partially between parties who are citizens of the state of Missouri, and not wholly between citizens of different states, between whom it could be fully determined; (3) because the

controversy was not wholly as to the liability of said Jesse, James and Joseph Seligman, but involved questions as to rights of property in which other defendants were interested.

Joseph Shippen and *John P. Ellis*, for motion.

Broadhead, Slayback & Haeussler, for petitioning defendant.

McCRARY, *Circuit Judge.*—The corporation defendant is a necessary party to a bill to enforce a judgment against it by compelling contribution from its stockholders. All the stockholders are likewise proper parties, if they apply to be heard, to the end that each may be assessed his equitable share only. Hence it is that in this case the controversy is not wholly between citizens of different states, and cannot be finally determined as between them.

For this reason it is, in my opinion, not removable under the last clause of section 2, act of March 3, 1875. That clause reads as follows: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district." It is not sufficient that the record presents a controversy between citizens of different states; it is necessary that it shall present a controversy *wholly* between such citizens, and one which can be *fully* determined as between them; that is to say without the presence of other parties. If, as in this case, the controversy between the citizens of different states is one which cannot be determined without the presence of other parties who are citizens of the same state with the party asking removal, or with the party against whom it is asked, then it is not wholly between citizens of different states, and the cause is not removable. If the necessary parties to the controversy can be arranged on opposite sides of it, so

that all on one side are citizens of one or more states, and all on the other side citizens of other states, the cause may be removed, even though certain proper but not necessary parties may be citizens of the same state with some of the necessary parties. Removal Causes, 100 U. S., 468. *Barney* v. *Latham*, 103 U. S., 205. If the controversy between citizens of different states is not the only controversy in the cause, then it must, in order to authorize a removal, be a separable controversy, that is to say, one which can be separately determined as between such citizens without litigating any controversy between citizens of the same state. Whether under the constitution congress has power to enact that *all* controversies between citizens of different states may be litigated in the federal courts, even where such controversies involve necessarily the determination of other controversies between citizens of the same state, is a serious question, but one which does not arise upon the construction of the act of 1875.

The motion to remand is sustained.

NOTE.—See *Blake* v. *McKim*, 103 U. S., 336. 20 Am. Law Reg. 483, where it is settled that congress has not provided for the removal from a state court of a suit, in which there is a controversy not wholly between citizens of different states and to the full and final determination of which, one of the indispensable parties on the side seeking the removal is a citizen of the same state with one or more of the plaintiffs or defendants against whom the removal is asked.

VAN ZANDT, Trustee, *v.* THE ARGENTINE MINING COMPANY.

(District of Colorado. June, 1881.)

1. MINING CLAIM — DEFECTIVE LOCATION CERTIFICATE MAY BE AMENDED — PAPER TITLE.—When there is conflicting evidence touching the facts necessary to make valid the original location of a mining claim, the paper title of grantees claiming under the original locator will go to the jury. A location certificate which is fatally defective, in omitting refer-

ence to natural object or permanent monument, may go to the jury in connection with an amended certificate correcting such defect.

2. PRACTICE — AMENDMENT AT THE HEARING.— Plaintiff having declared for the entire property, it was developed on the trial that in consequence of a defective deed, he had title to only two-thirds of the claim: *Held*, that plaintiff could not, on this declaration, recover for two-thirds, and that the person holding title to the other third of the claim might not, without his consent, be joined as party plaintiff, yet plaintiff might amend his complaint so as to demand but two-thirds.
3. MINING CLAIM — PREREQUISITES TO LOCATION.— Under the statutes, federal and state, no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim; and a discovery shaft must be sunk thereon to the depth of at least ten feet. The mineral or ore so discovered must be in position — in the form of a lode — and not in a broken and fragmentary condition, intermingled with slide and *debris* on the surface. Discovery of ore after location, in a different part of the claim, will not avail.
4. THE BURDEN is on the plaintiff to establish the fact that ore was so found in his discovery shaft, and that the same lode is continuous to the ground in controversy.
5. EVIDENCE, WHAT SHALL BE OF PRIOR LOCATION.— Proof of the date of plaintiff's location, the others not being shown, and the fact that plaintiff's location is excepted from defendant's patents will raise a presumption that plaintiff's location was first made.
6. THE TOP OR APEX, ON A JUNIOR DISCOVERY — SENIOR LOCATION ON THE "DIP" WILL HOLD.— Ordinarily the owner of a mining claim in which is found the top or apex of a lode may follow the vein within or without his side lines on its "dip" to any depth; yet if the same vein has been previously discovered and located on the "dip," such discovery will prevail against a junior discovery, though located on the apex of the vein.

C. S. Thomas, *T. M. Patterson*, *J. B. Beeford*, for plaintiff.

H. C. Thatcher, *G. B. Reed*, for defendant.

Action to recover possession of the Adelaide mining claim, in California district, Lake county, Colorado.

Plaintiff offered evidence to prove that the claim was located by Walls and Powell, in the year 1875. As to marking the boundaries of the claim on the surface of the ground, and the

finding of valuable ore in the discovery shaft, the evidence was slight; and defendant objected to plaintiff's record title, on the ground that these facts were not shown. As there was some evidence on both points, the court held that the paper title should be received. In the original certificate of location the description of the claim contained no reference to a natural object or permanent monument; but this was corrected in an amended certificate, and both were received, although it was held that the first was fatally defective.

Having declared for the entire interest in the claim, plaintiff failed to show title from the original locators to an undivided one-third interest. One of the deeds upon which he relied was not sufficiently proved, and upon defendant's objection it was excluded. Thereupon he moved for leave to make the grantor in that deed, in whom the title to the said one-third interest would rest (assuming that instrument to be void), a party plaintiff in the suit.

And this was denied by the court;

First. Because the deed, for aught that appears, was effectual between the parties to it to transfer the property; and

Second. A stranger should not be made a party to the suit, without his knowledge and consent, which is not shown.

Plaintiff then suggested to the court, that upon his declaration for the whole interest, he could take a verdict for two-thirds, pursuant to sixth paragraph of section 251 of the Code of Procedure of the state. But the court was of the opinion that section 249 of the code, which requires the plaintiff to state the interest claimed by him, should control, and that plaintiff having declared for the whole could not recover an undivided interest. Nevertheless, the plaintiff was allowed to amend his complaint at the trial so as to demand but two-thirds interest, and the court said that this was often done. For the plaintiff having at first asked judgment for the whole, the defendant cannot now be surprised that he asks only a part.

In the further trial of the cause it appeared that the defend-

ant claimed under two locations, called the Camp Bird and Pine, which it held by patent from the government. Plaintiff's claim is in the general course north and south, or, to be exact, north 33° 10′ east. Defendant's two claims, overlapping the other somewhat transversely, are in the general course east and west. The contesting claims have the relation of the jaws of shears, and the ground in controversy is that included in the space of intersection and a small part of the Adelaide claim immediately north of the intersection. The discovery shaft of the Adelaide claim is or was at the north end of the claim, and some three or four hundred feet from the ground in controversy. By later operations and the erection of a mill and ore-house in the vicinity, it had been filled and the position of it in the claim was not *very* well shown. Between this shaft and the ground in controversy, there were no openings to prove that the lode extended in that direction, and whether it did so extend was strongly controverted. Defendant gave evidence to prove that no mineral was found in the discovery shaft, and that the condition of the ground was such, that if any was found there, it was broken and fragmentary, or in other words, of the character of float mixed with the slide on the surface of the mountain. It appeared, however, that plaintiff and his grantors had maintained possession of the premises from the first; had made valuable improvements on the claim, and had carried on extensive mining operations at and near the ground in controversy.

The Camp Bird and Pine discoveries were west of the ground in controversy, two or three hundred feet, and as defendant contended, on the top and apex of the lode, which at that point extended almost directly across those locations. The defense by answer, to the support of which many witnesses were brought into court, was that the ore in controversy was a part of the vein which defendant held by its top and apex. If what has been said to explain the position of the claims is intelligible, it will be apparent that in this view the Adelaide location extended across the vein and on its dip be-

low the top and apex, which was to the west of that location. And as the Adelaide location was first in time, it became a question whether a location so made and otherwise sufficient would be valid against a junior location on the top and apex of the vein. This having been ruled as expressed in the charge to the jury, much testimony as to the top and apex of the vein, and the continuance of the vein to the ground in controversy, was withheld, and the case stood on the validity of plaintiff's location:

Whether a vein *in place* was found in the discovery shaft of that location; and,

Whether the vein, if found there, extended to the ground in dispute.

The court charged the jury as follows:

HALLETT, *District Judge.*— The questions to be determined on the evidence relate to the plaintiff's location, which he calls the Adelaide.

As to the work on the ground necessary to a valid location, the statute of the state provides among other things that a discovery shaft shall be sunk to the depth of at least ten feet, or deeper if necessary to find a well-defined crevice. And the federal statute declares that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.

The position of the plaintiff is, that Walls and Powell, the locators of the Adelaide claim, found a lode or vein in the discovery shaft sunk by them, and that position is controverted by defendant. I do not recall anything said by witnesses as to a crevice in that shaft; but there is some testimony to the effect that ore-bearing silver was found there. If you find from the evidence that such ore was taken from the Adelaide discovery shaft, it is important to consider whether it existed in mass and position; or in other words, in the form of a vein or lode; or on the other hand, in a broken and fragmentary condition, intermingled with the slide and *debris* on the sur-

face of the mountain. For it rests with the plaintiff to show that ore was found in the discovery shaft, and also that the same body, vein or lode, extends to the ground in controversy. Of course, if ore was found in the discovery shaft, and the ore so found was broken and fragmentary, it cannot be said that a body of ore — a vein or lode — was found in that shaft which extends to the ground in dispute.

So that, if you find that no ore was discovered in the discovery shaft of the Adelaide claim, or if ore was found in that shaft and it was broken and fragmentary, your verdict will be for the defendant.

And in this view (that is, assuming the facts to be as stated), the circumstance that plaintiff's grantors afterwards developed the body of ore in controversy higher up the mountain side will not affect the result. For a location rests on what may be found in the discovery shaft. And if nothing is found there, or if what is found there does not extend beyond the limits of the shaft, the discovery of a body of ore elsewhere in the claim will not avail.

But if a vein or lode was found in the discovery shaft of the Adelaide claim, and it extends throughout the ground in controversy, the plaintiff may prevail.

Something has been said as to whether the locators complied with the other provisions of the statute, relating to posting notice of the discovery on the claim, staking the boundaries, all of which must be shown in evidence to constitute a valid location.

If you find these things to be proved, and that a vein or lode was found in the discovery shaft, the question remains whether such vein or lode extends to the ground in controversy. Upon the evidence here, it may come to the point whether the lode of ore found in the several shafts on the hill was also found in the discovery shaft of the Adelaide claim. Nevertheless, if you believe from the evidence that a vein or lode was found in the discovery shaft, and that it is not the same as the vein or veins found in the shafts on the same claim

higher up the hill, but that it extends throughout the claim, the plaintiff may prevail.

This being shown, although defendant's locations may appear to you to be along the line of the top, apex or outcrop of the vein, it cannot prevail against a senior location on the dip of the lode. That plaintiff's location is of earlier date than either of defendant's may be assumed upon two grounds: First, the date is shown as August, 1876, and in the absence of evidence we cannot presume that the others are of earlier date. Second, in the patent put in evidence by defendant, the Adelaide surface ground is excepted from the grant. This may be *prima facie* evidence that the Adelaide claim is of older date than the others; but it is not evidence of anything more.

In taking the patents in that form there was no recognition of the plaintiff's right, or the validity of the Adelaide claim; nor is the defendant in any way precluded thereby from contesting that claim.

The exception in the patent to the Pine claim, to which reference has been made by counsel, does not in any way relate to the matters in controversy here. It should not have any weight whatever with you. The matters in issue are as herein stated, and you will determine them according to the rules now given you, and by the preponderance of evidence. The burden is on the plaintiff to establish every material fact, as hereinbefore declared.

The jury returned a verdict for plaintiff.

THE MEMPHIS & ST. LOUIS PACKET COMPANY *v.* STEAMBOAT H. C. YEEGER and others.

(Eastern District of Missouri. November, 1880.)

1. ADMIRALTY LAW — COLLISION — DAMAGES. — The expenses from the port of departure, to the place of collision and of return to the port of repairs, will not be allowed in damages.

Memphis & St. Louis Packet Co. v. Steamboat H. C. Yeager.

In admiralty. On exceptions to commissioner's report.

Noble & Orrick, proctors for libellant.

Given Campbell, proctor for libellee.

TREAT, *District Judge.*—The court having heretofore decided that the collision was one of mutual fault, the only question remaining was to determine the amount of damages, and apportion them accordingly, that is, a moiety of the aggregate against each of the parties. Exceptions by libellant are that the expenses from port of departure to place of collision and return to port of repair (which is port of departure) have not been allowed. The rule is "*restitutio in integram;*" but to ascertain under that rule what is allowable, the courts have been compelled to exclude the inquiry into speculative or possible profits.

It may seem that the full restitution against a maritime tort should cover all the expenses of a voyage; yet it may be that the voyage was a losing one and hence its interruption was no actual loss. Where loss of freight occurs — that is, net loss — the amount may be included, but there is no such item here. Hence the libellant's exceptions must be overruled. *The Baltimore*, 8 Wall. 377; *The Cayuga*, 14 Wall. 270; *The Atlas*, 93 U. S. 302.

None of the cases cited do more than state the general rule, yet that rule in its application must control. Respondent, on the other hand, excepts on the ground that the demurrage is fixed at too high a rate. An examination of the testimony shows that $100 per day would be a fair rate for a charter-party, instead of $140 per day.

The exceptions of respondent are sustained, and instead of sending the cause back to the commissioner, the amount of damage will be reduced accordingly.

GRAY *v.* HINTON *et al.*

(District of Nebraska. January, 1881.

1. CONTRACT — ENTIRETY.— No precise rule can be given by which the question whether a contract is entire or separable can be determined. Like most other questions of construction, it depends upon the intention of the parties to be gathered from what appears upon the face of the contract and surrounding circumstances.
2. SAME — SAME.— Where certain parties signed an agreement declaring that they would pay to a railroad company or its assigns $60,000, to be paid in installments, one portion when a railroad should be graded through two precincts named and another portion when the road should be finished, the consideration for the promise being declared to be the construction of the road through said precincts. *Held*, that the parties signing the agreement were not liable on the contract for the first installment, without an allegation in the petition, that the company have finished or offered to finish the road.
3. CONTRACT — MUTUALITY.—The contract above described shows no mutuality. The railroad company was not bound by it. It amounted to a proposition by defendants, which could be made mutual and obligatory only by an acceptance on the part of the company.
4. SAME — SAME — WHAT AMOUNTS TO AN ACCEPTANCE.— The performance of the contract by the railroad company would amount to an acceptance, and avoid the objection of want of mutuality; but part performance and a failure or refusal to complete the performance did not have that effect.

On demurrer to petition.

The facts, as they appear by the allegations of the petition, are as follows:

The Nebraska Railway Company was a corporation organized for the purpose of constructing a road from Brownsville to Lake City. The precincts of Ohio and Falls City, in the county of Richardson, had voted to subscribe for a certain amount of the capital stock of said railway company for the purpose of aiding the construction of said railroad. The railway company contracted for the construction of the road through the said precincts of Ohio and Falls City. Litigation being threatened by parties adverse to the policy of granting

aid by the precincts above mentioned, the defendants in this suit, one hundred and fifty in number, signed the contract upon which this suit is brought. The contract, in so far as it is material to be considered, is as follows: The consideration for its execution on the part of the defendants is stated to be "the sum of one dollar to us in hand paid by the Nebraska Railway Company, and the advantages thereafter to accrue by the construction of said railway through the precincts of Ohio and Falls City." And the defendants agree as follows: "To pay jointly and severally to the Nebraska Railway or its order the sum of sixty-five thousand dollars in lawful money of the United States of America, to be paid in installments as follows, to wit: Ten thousand five hundred dollars thereof when said railway company has graded its road-bed and built its culverts through the precinct of Ohio, according to the terms of the foregoing proposition; thirty-five thousand dollars thereof when the said Nebraska Railway Company shall have graded its road-bed and built its culverts through the precinct of Falls City, according to the terms of the foregoing proposition; nineteen thousand five hundred when said Nebraska Railway Company shall have graded, tied and ironed its roadway through the precincts of Ohio and Falls city, according to the foregoing propositions. Each installment of which shall be truly and promptly paid."

The "foregoing proposition" referred to in this agreement, among other things, provided that the railroad should be constructed before December 1, 1876. The petition alleges that the grading was completed in accordance with the contract; but there is no allegation that the road has ever been completed. The time for the completion of the road, according to the terms of the agreement, had elapsed before the commencement of this suit. The defendant files a general demurrer to the petition, under which he insists, first, that the contract is not binding on the defendants for want of mutuality; second, that the contract is an entirety; and as the plaintiff has commenced this action after the expiration of the time within

which the railroad company was to have completed the railroad, he cannot recover without alleging and proving a full performance of the contract on the part of the company, or in other words, that it has finished the road; third, that the plaintiff cannot recover without alleging performance of all the stipulations of the contract to be performed upon the part of the railroad company.

O. P. Mason, for plaintiff.

E. W. Thomas, for defendant.

McCrary, *Circuit Judge.*— The demurrer raises the question whether suit can be maintained on the contract upon the facts disclosed by the petition. The plaintiff sues after the expiration of the time within which, by the terms of the contract, the road was to have been finished. It is alleged that the grading was completed according to the contract, but it is not alleged that the road was finished. The question is, whether, under the contract, plaintiff can recover for the grading without alleging that he has finished the road, or offering some sufficient excuse for his failure to do so; or, in other words, we are to consider whether the agreement to do the grading was a contract separate and distinct from and independent of the agreement to finish the road, so that the plaintiff can sue upon the contract and recover for the grading without alleging compliance or readiness to comply, with the other part of the agreement. Speaking of the "entirety of contracts," Mr. Parsons says: "The question whether a contract is entire or separable is often of great importance. Any contract may consist of many parts; and these may be considered as parts of one whole, or as so many distinct contracts entered into at one time, and expressed in the same instrument, but not thereby made one contract. No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case by consider-

ing the language employed and the subject matter of the contract." 2 Pars. Con. 517.

From what appears upon the face of this contract and surrounding circumstances, we are to determine whether it was the intention of the parties to make one contract for the construction of a railroad, or two separate contracts, one for the grading and the other for the bridging, tying and ironing of the roadway through the precincts of Ohio and Falls City.

It seems pretty clear that the subject-matter of the contract was an entirety, to wit: A completed railroad. The case is not like many we find cited in the books, in which two or more separate and distinct articles of property are sold and conveyed by a single instrument, for separate and distinct prices, at one and the same time. In such cases it often appears that the purchase of each article was a separate and distinct transaction, and intended to be so regarded by the parties to the contract. There is in such cases no necessary connection between several articles sold and conveyed. There is nothing from which it can be inferred that it was not the intention of the purchaser to secure one without also securing the others. The case before us, however, is quite different. It cannot be supposed that the defendants would have employed the railroad company to do the grading alone, without it had at the same time agreed to go on and complete the road. The contract itself declares that the consideration for the contract, on the part of the defendants, was the benefits they were to receive by the construction of the road through the two precincts named. Suppose the railroad company or its contractors, after completing the grading had failed or refused to go on and complete the road upon the demand of the defendants, would it be contended that the plaintiff, under such circumstances, could maintain an action upon the contract? This is probably the test. See *Robinson* v. *Green*, 3 Met. Mass. 159. If it were alleged in the petition that the railroad company or the contractors completed the grading and were ready, able and willing to go on and finish the road; that they

offered to do so and were prevented by the act or fault of defendants, a very different question would arise; but an allegation that the grading was completed, without more, is insufficient, because it is manifest that the defendants did not intend to bind themselves to pay for grading, and leave the contractors at liberty to finish the road or not at their option.

The parties must have understood that the defendants were binding themselves to pay a large sum of money to secure the construction of the railroad through the precincts in which they resided and held property. If the proposition, upon which this action is based, to wit: That the defendants were to pay the price named for the grading, whether the road was completed or not, had been suggested at the time of the execution of the contract, no one of the defendants would have assented to it. They undoubtedly regarded the contract as an entirety. Such was the intention; and the construction of the contract as to its being several or entire depends upon the intention of the parties to it.

But, independently of this consideration, there can, I think, be no doubt upon another question which is presented by this record. The contract itself shows no mutuality. The defendants bound themselves to pay a certain sum of money, provided plaintiff's assignor, the railway company, would complete a certain railroad; but there is nothing in the contract to bind the company to complete the road. The performance of the contract by the railroad company would avoid this objection. The rule is that where one party agrees to pay a certain sum of money, if another party will do certain acts, the latter is not bound; but the agreement of the former may be considered as a request to the latter to do the acts named, and the doing of the acts is an assent, and the promise thereby becomes mutual and obligatory. But this case presents the question whether a performance of a part of the act specified and a failure to perform another part will answer the objection that there is no mutuality. The rule is that performance is an assent to the terms proposed; but I know of no authority for

the proposition that part performance will amount to an assent. See 13 Ohio St. 94; where it is distinctly held that "this rule does not appear to be applicable where the act done only constitutes a part of the consideration, and shows no assent to the terms of the contract." The performance by the party to whom the offer is made takes the place of a formal acceptance of a proposition to contract; but a part performance, without an offer to make full performance, is not an acceptance, no more than an acceptance in writing of a part of a proposition could be regarded as an acceptance of the whole. In such a case, whatever the rights of the plaintiff might be in a suit upon the *quantum meruit*, he has no right of action upon the contract itself.

The demurrer to the petition is sustained.

WEAR *v.* MAYER.

(Eastern District of Missouri. September, 1880.)

1. WRIT OF ERROR TO DISTRICT COURT — WHEN TO BE ALLOWED.— Under section 4981, Revised Statutes of the United States, a cause cannot be removed from the district to the circuit court unless the writ is claimed and notice given within ten days, as in cases of appeal.
2. TRIAL OF ISSUE OF FACT BY THE COURT — EXCEPTIONS.— It is well settled that in the absence of a statute authorizing that mode of proceeding, no exception can be taken to any opinion of the court upon admission or rejection of evidence, or upon any other question of law which may grow out of the evidence when no jury is impaneled.
3. STATUTE CONSTRUED — THE REVISED STATUTES U. S. DO NOT CHANGE THE RULE.— Several statutes on the subject examined and construed, and *held*, that the trial of issues of fact in the district courts in all cases except those in equity and admiralty, and except as otherwise provided in proceedings in bankruptcy, must be by jury.

L. W. Scott & D. W. Wear, for plaintiffs in error.

W. B. Homer and *L. B. Kellogg*, for defendant in error.

McCRARY, *Circuit Judge.*— This was an action at law in the district court, brought by Mayer, as assignee in bankruptcy of one Wellington Stewart, to recover the value of certain goods alleged to have been obtained by plaintiffs in error from Stewart by way of fraudulent and illegal preference. A jury was waived, and by consent of parties the issues of fact were submitted to the court; the finding and judgment was for the assignee, and the cause has been brought into this court by writ of error. The bill of exceptions shows the findings of fact by the court in the nature of a special verdict, and also sets forth certain testimony, together with the court's ruling thereon, and exceptions to the same. Counsel for the assignee moves to dismiss the writ of error, for the reason that this court has no jurisdiction of the case. In support of this motion it is insisted that the plaintiff in error should have given notice as required by section 4981 of the Revised Statutes of the United States. That section provides as follows: "No appeal shall be allowed in any case from the district to the circuit court unless it is claimed and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from, nor unless the appellant at the time of claiming the same shall give bond in the manner required in cases of appeals in suits in equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs." In the case of *Insurance Co.* v. *Comstock*, 16 Wall. 266–7, the supreme court construes this section as follows: "Taken literally, the ten days' limitation does not extend to writs of error, but the better opinion is, in view of the fact that writs of error and appeals are associated together in the first clause of the section, that the word appeal at the commencement of the second clause means the same as review or revision, and that it was intended to include the writ of error as well as

appeal, as the whole section seems to contemplate a more expeditious disposition of the cause in the appellate court than that described in the judiciary act, or the act to amend the judiciary system." Following this clear intimation of the supreme court I should, even if there was no other question of jurisdiction presented by this record, feel constrained to sustain the motion to dismiss. But that motion is urged upon another ground, which I proceed to consider. It is insisted that the cause having been tried before the judge of the district court, sitting in place of a jury, by consent of both parties, the judgment cannot be reviewed in the circuit court upon a writ of error. The finding of an issue of fact by the court upon the evidence, either with or without the consent of parties, was a proceeding altogether unknown in the common law; and it is well settled that, in the absence of a statute authorizing that mode of proceeding, no exception can be taken to any opinion of the court upon admission or rejection of testimony, or upon any other question of law which may grow out of the evidence where no jury is impaneled. *Campbell* v. *Boyreau*, 21 How. 226; *Blair* v. *Allen*, 3 Dillon, 101; *Kelsey* v. *Forsythe*, 21 How. 85; *Geld* v. *Frontir*, 18 How. 135; *Burr* v. *Des Moines, etc.* 1 Wall. 99.

The doctrine of these cases is not disputed by counsel for plaintiff in error, and he admits that they are conclusive of the question, unless the provisions of section 914 of the Revised Statutes of the United States are applicable to and decisive of the controversy. That section provides that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings and forms and modes of proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." It is very clear that this section goes no further than to provide a general rule regulating practice and procedure in the federal

courts, in the absence of any express congressional enactment upon the subject. It does not by implication repeal any previous act of congress expressly requiring a particular mode of proceeding in any given case or class of cases. Section 556 of the Revised Statutes (which, in my judgment, was not repealed by the later act embodied in section 914) provides that "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury." Section 649 of the Revised Statutes provides that "issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury." This provision, however, cannot be extended to proceedings in the district court, but on the contrary leaves in full force the statute above cited, which requires that the trial of all issues of fact in that court (with certain enumerated exceptions not material to this question) shall be by jury. It follows, from these considerations, that a writ of error does not lie in a case like the one under consideration, to re-examine and revise the action of the district court, and the writ is accordingly dismissed for want of jurisdiction.

CHAPIN v. WALKER *et al.*

(District of Kansas. November, 1880.)

1. AFFIRMATIVE RELIEF IN EQUITY — CROSS-BILL.— It is well settled that any affirmative relief sought by a defendant in an equity suit must be by cross-bill, and can never be granted upon the facts stated in the answer.
2. TITLE CANNOT BE INVESTIGATED IN A SUIT TO FORECLOSE A MORTGAGE.— According to the practice which prevails in the federal courts, in a suit to foreclose a mortgage, the mortgagee's title will not be investigated. Such title must be investigated in a court of law.

Chapin v. Walker.

This is a bill in equity to foreclose a mortgage executed by respondent Dempsey R. Walker to John C. Burrage, conveying certain real estate to secure the payment of a promissory note. The bill alleges default in the payment of said note; that complainant is the holder and owner of the same, and entitled to foreclosure; and that the other respondents, including A. A. Brockway, have, or pretend to have some claim to, interest in or lien upon said mortgaged premises; but that said claim, interest or lien is subsequent and subordinate to the lien of complainant.

The answer of respondent Brockway alleges that on the thirteenth day of January, 1876, the date of complainant's mortgage, as set out in his bill, the said property described in his said mortgage as (describing it) was owned by, and the title was in the government of the United States, and that the same was then, and for a long time afterwards, a part of the public lands of the United States; and that neither at the date of the said mortgage, nor at any time since, has the said Dempsey R. Walker (the mortgagor) had any title or interest in said real estate, and that neither the complainant nor his assignor took any interest in, or lien on said real estate, by virtue of the said mortgage set out in complainant's bill.

It is further alleged that, on the twenty-sixth day of March, 1877, one Nicholas Walker entered the land in controversy, and received a patent therefor from the United States, and that he afterwards executed to the said respondent Brockway a mortgage upon the same, which he still holds unsatisfied. The prayer of the answer is, that complainant's mortgage may be declared void and held for naught, and that respondent's lien be declared a first and prior lien on said land.

Brown & Campbell, for complainant.

Webb & Glasse and *T. C. Corey*, for respondents.

McCrary, *Circuit Judge.*—There are several objections to granting the relief sought by the respondent.

1. In the first place, if he were entitled in this case to that relief, it would be necessary for him to seek it by a cross-bill. It is well settled that any affirmative relief sought by a defendant in an equity suit must be by cross-bill, and can never be granted upon the facts stated in the answer. Story's Eq. Pleadings, Redfield's edition, sec. 398 A.; *McConnell* v. *Smith*, 23 Ill. 611; *Armstrong* v. *Pierson*, 5 Iowa, 317.

2. It is also well settled that, according to the practice which prevails in the federal courts in a suit to foreclose a mortgage, the mortgagee's title must be investigated at law. In a foreclosure proceeding, the court will not inquire what interest the mortgagee has in the mortgaged premises. 2 Jones on Mortgages, sec. 1482; *Bull* v. *Meloney*, 27 Conn. 560; *Palmer* v. *Mead*, 7 Conn. 149; *Hill* v. *Meeker*, 23 Conn. 592; *Williams* v. *Robinson*, 16 Conn. 517; *Dial* v. *Reynolds*, 96 U. S. 340.

In the last named case the supreme court, per Swayne, Justice, say: "It is well settled that, in a foreclosure proceeding, the complainant cannot make a person who claims adversely to both the mortgagor and mortgagee a party, and litigate and settle his right in that case. Barbour, Parties in Equity, 493, and the cases there cited."

In *Hill et al.* v. *Meeker*, *supra*, it appeared that the title of the mortgagee to one of several tracts of land embraced in the mortgage was denied. The case was exactly analogous to the one at bar, and the court held that the complainant could take the decree of foreclosure, leaving the parties at liberty to litigate the title in an action at law.

The decree in this case will be modified so as to provide that said decree, and the sale thereunder, shall be without prejudice to the right of the respondent Brockway, by proper legal proceedings, to contest the legal title to the land described in the answer as claimed by him.

In the Matter of Receivership of Iowa and Minnesota Construction Company.

(District of Iowa. May, 1881.)

1. Removal — Cause cannot be Removed before Service of Process or Appearance. — The mere filing of a petition or bill without the issuing of process or service of notice of any kind, and where there is no appearance, does not constitute a *suit* which may be removed from a state to a federal court.

On motion to remand.

The Iowa and Minnesota Construction Company is a corporation existing under the laws of Iowa.

On the second day of February, 1875, one L. Schoonover filed his petition in the circuit court of Jones county, Iowa, alleging that he had previously, as trustee for Stacey & Walworth, obtained judgment against said corporation for $3,759.57, which remained unpaid; that the capital stock of said corporation was $100,000, and had been subscribed by certain persons who were named, and that said capital stock had not been paid in to a greater extent than twenty per cent. of the amount subscribed. It was further alleged that said corporation was insolvent, and that the petitioner could find no property or assets to satisfy the aforesaid judgment.

Thereupon the petitioner prayed to be appointed receiver of said corporation, with authority to take possession of the books and papers thereof, and to levy a sufficient assessment upon the stockholders to liquidate the liabilities of the company. By an order of the judge, indorsed upon the petition, the same was set down for hearing on the first day of the March term, 1875, of the circuit court of Jones county, upon notice to be given to each stockholder and others interested, by publication in a newspaper and by mailing a copy to the reputed postoffice address of each stockholder.

There is due proof of the publication and mailing of notices, as required by the order of the judge, and on the

second day of March, no one appearing for the stockholders, default was entered against them and a decree rendered appointing the said Schoonover as receiver and fixing his bond at $5,000.

Afterwards several assessments upon the stockholders were ordered by the court or by the judge in vacation, for the payment of debts of the company, and several reports were made by the receiver and passed upon by the court, from some of which it appears that he had instituted suits against several of the stockholders, including F. E. Hinckley, A. B. Cox, J. Jameson and George Boone.

These proceedings were carried on in the Jones county circuit court without appearance on the part of the stockholders, until the third of November, 1879, when George Boone, John M. Whittaker and Frances E. Hinckley filed their intervening petition, therein alleging that they are stockholders; that certain claims against the company are fraudulent, denying notice of the proceedings, besides numerous other allegations, which need not be repeated here. By said petition they pray an accounting, and that the orders for assessment upon the capital stock be set aside, as well as the order appointing Schoonover as receiver. Upon the filing of the intervening petition in vacation, and without notice to any one other than that which is afforded by the filing of the same, a petition and bond in due form were filed in the clerk's office of the state court for the removal of the cause to this court. The receiver now appears here and moves to remand.

Miller & Godfrey, for motion.

G. W. Kretzinger, contra.

McCrary, *Circuit Judge.*— As the case stood prior to the filing of the petition of intervention (which is in substance a bill of review), it was not removable under the act of March 3, 1875, because the time for removal had passed.

The case had been pending in the state court over three

years. The statute requires that the petition for removal shall be filed "before or at the term at which said cause could be first tried and before the trial thereof." Sec. 3, act of March 3, 1875.

If the cause is removable, it must be upon the ground that the petition of intervention or bill of review above named is a suit within the meaning of the act. The language of the law is, "that any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court," etc., may be removed. The sole question here is whether the mere filing of a petition under the state practice in a court of the state, without the issuing or service of notice or process of any *kind*, constitutes a suit within the meaning of the act. I am clearly of the opinion that it does not. Upon general principles, I should say without hesitation that process is essential to the institution of a suit. In the very nature of the case it must be necessary to bring the party defendant into court before any step can be taken to change the *forum* or for any other purpose affecting his rights.

The reasons for this rule are too manifest to require statement here; but it is also clear that the suit must exist in the state court, according to the state law, before it is a suit removable under the act of congress. It must be a suit in which a judgment or decree could be rendered in that court or some action taken affecting the rights of parties.

In other words, it must be a suit "commenced" in the state court, within the meaning of the state law.

How then are suits to be commenced under that law? By section 2599 of the Code of Iowa, 1873, it is provided that "actions in a court of record shall be commenced by serving the defendant with a notice, signed by the plaintiff or his attorney, informing the defendant of the name of the plaintiff, and that on or before a date therein named a petition will be filed," etc.

The term "action," under the statute of Iowa, is identical with the word "suit" in the act of congress.

This step, or some other equivalent to it, must be taken before a suit is pending, for the purposes of the removal act, unless indeed service be waived by a voluntary appearance.

The motion to remand is sustained.

The Farmers Loan & Trust Company v. The Central Railroad of Iowa.

(District of Iowa. May, 1881.)

1. Receiver of Railroad — Purchase of Property at Foreclosure Sale — Liability to Suit in Certain Cases. — Where, in a suit to foreclose a mortgage upon a railroad, a receiver appointed by the court had been discharged, and the property by order of the court turned over to the purchaser, the court reserving jurisdiction of the case for the purpose of enforcing debts and liabilities incurred by the receiver: *Held*, that suit to enforce unsatisfied claims, whether upon contract or tort against the receiver, which, if established, would constitute liens upon the property, are to be prosecuted against the property as proceedings *in rem*, upon proper notice to the purchaser, and not against the discharged receiver.
2. Establishment and Enforcement of Lien. — It is competent for the court in such a case to establish a lien against the property in the hands of the purchaser, and to fix a time for the payment of the sum found due, and in default of such payment to order a sale of the property. The cause is to be tried with or without a jury, according to the nature of the claim as to being legal or equitable.

Love, *District Judge.* — This case is now before the court upon a motion by H. L. Morrill, late receiver, and the Central Railroad Company of Iowa, to rescind an order made at the May term, 1880, granting permission to Mahala Clear, as next friend of Edward Sloan, to sue said receiver, Morrill, for personal injuries received by said Edward Sloan during the receivership of said Morrill.

The order granting leave was made after receiver Morrill had been discharged, and subsequent to the final decree of May 20, 1879, by which the railway property and all funds in the custody of the court had been turned over to the new railway company, called the Central Iowa Railway Company.

This motion raises a very difficult and embarrassing question. It is this: When in a foreclosure suit, a receiver appointed by the court has been discharged, and the property by the order of the court turned over to the purchaser, how are unsatisfied claims against the receiver, upon torts committed and contracts made by him, to be prosecuted and satisfied? Who are to be made defendants to actions upon such claims? How are such cases to be tried? What is the nature of the judgment or decree to be entered, and how is satisfaction to be obtained?

So long as the receiver is in office, and the fund or property is under the control of the court, there is no difficulty, for the court will in all proper cases permit actions to be brought against the receiver, and will order satisfaction to be made out of the fund or property. But it is obvious that such actions are, strictly speaking, rather in the nature of proceedings *in rem* than *in personam*.

No receiver could be made individually liable in a personal action upon a contract made in his official capacity or for torts committed by his subordinates. If receivers could be exposed to such individual responsibility, no prudent man would accept such trusts in cases where vast numbers of subordinates must needs be employed, exposing him to the hazard of ruinous liabilities for their misconduct. In this respect receivers are like public officers, who are not individually responsible upon their official contracts, nor for torts committed by their subordinates, but only for torts committed by themselves, or contracts in which they assume to bind themselves personally.

It is therefore obvious that suits against receivers are really and substantially suits against the fund or property of which they are the custodians. They represent the property or fund. If judgment be obtained against them, the court orders it to be satisfied out of the fund or property. This view will be made evident by the supposition that the receiver should be removed or discharged, while the property or fund should remain in the custody of the court. In such case, it cannot

be doubted that the court would entertain an intervening petition in the nature of a proceeding *in rem* against the fund or property at the suit of any one entitled to a lien upon it, or having a claim in law or equity to satisfaction out of it.

Doubtless, in such case the court would have power to appoint counsel to represent the fund or property in the litigation concerning it, and would require notice to parties interested in its sale or distribution.

But what would be the remedy of the claimant if the court should discharge the receiver, and place the fund or property beyond its control, by turning it over without reservation to a purchaser?

I confess, that if the fund or property should be turned over to a purchaser without reservation, I am at a loss to see what the remedy of the claimant would be — as, for example, the old railroad company — in this case. How could he found a personal action of tort or contract against a party who would be a stranger to the tort or contract? How could he count upon or prove the tort or contract against a party who never committed the one nor made the other?

It has been suggested by an eminent judge that the receiver might be treated as the agent of the defendant railway company, and the action thus maintained directly against the company. But it seems to me that this position is untenable. There is not the slightest analogy between the relation of a receiver to the railway company and the relation of an agent to his principal.

An agent acts and contracts for and in the name of his principal and by his authority. He is appointed by his principal and he is subject to his principal's control.

The principal can dissolve the relation between them, and annul the agent's authority at his will and pleasure. Hence the principal is liable and the agent is not liable. Hence the action should be against the principal and not the agent. It is needless to say that, in all these respects, there is a radical difference between the character and legal functions of an

agent and a receiver appointed by a court of equity. To make a railway company responsible for the acts and contracts of an officer whom they can neither appoint nor control, direct nor remove, on the ground of agency, would be to violate the fundamental principles of the law of agency.

If no action could be maintained upon the torts or contracts of the receiver against the old railway company *a fortiori*, none could be supported against the new or purchasing company. Doubtless, if the claimant had a legal or an established equitable *lien* against the property, he could enforce it by a proper proceeding at law or in equity in any court of competent jurisdiction; but we are now considering not legal or established equitable liens, but claims of a personal nature, founded upon contract or tort, which are yet to be established by some form of legal proceeding.

I repeat that if the receiver had been discharged and the property turned over to the new company unconditionally, and without reservation, I am at a loss to see what legal remedy claimants, without established liens, would have. But the court did not in this case so turn over the property. It would have been a most unwise and unjust proceeding to have done so, leaving just claims and liabilities incurred by a receiver of its own appointment, without any provision whatever to enforce them. On the contrary, this court in the final decree of May 20, 1879, retained here the case of the Farmers Loan and Trust Company against the Central Railroad Company of Iowa, and others, and in express terms reserved its jurisdiction of said cause to enforce the payment of debts and liabilities incurred by its receivers. For this purpose at least that suit has never been dismissed. It is still pending, and any claimant with a demand against the receiver, which he has a right by law to have established as a lien against the railway property, may, by leave of the court, intervene in the foreclosure cause and assert his claim. It is not necessary that the claimant should make new parties to his petition. He intervenes in the old chancery case which is still pending. He asserts his right to

a lien upon the property which the court turned over with a reservation of jurisdiction to hear and determine his cause.

That this view of the decree is correct will be made manifest by the following provisions of the decree of May 20, 1879:

"And since it is not desirable to further continue said property under the control of the receiver, for the purpose of making net earnings for the payment of said debts, costs and expenses, etc., it is further ordered and decreed that all said claims and all claims pending in this court, debts and liabilities, etc., shall be presented to said Central Iowa Railway Company for adjustment and settlement, and said company are ordered to pay the said debts, costs and expenses, etc., and for the purpose of enforcing the payment thereof, if need be, this court will and does retain jurisdiction of said cause, for the purpose of enforcing said payment and the lien herein provided for, without other action or independent proceeding."

The proceedings by which the claimant asserts his rights is analogous, at least to an action *in rem*. Now, it is familiar law, that in order to give a court full and complete jurisdiction *in rem*, some form of notice must be given to parties whose rights and interests may be affected by the decree; and where no form of notice is prescribed by law, the court is empowered to direct the notice to be given. This notice is sometimes personal, and in some cases by publication, depending upon the situation of the parties. In the present case the new railway company, the Iowa Central Railway Company, is the party whose interest would be affected by a decree establishing a lien upon the property. The petitioner must therefore give that company notice, and since it exists within the jurisdiction of the court, the notice must be personal. All this proceeds, of course, upon the condition that the claim has been presented to the company for payment and adjustment, according to the express terms of the final decree, and rejected.

These preliminaries having been satisfied, it is competent for the court, if the plaintiff is by law entitled to a lien, to establish the same against the property, and to fix a time for

the payment of the sum found to be due; and in default of payment at the time prescribed, a proper order of sale will be awarded.

It is obvious that the plaintiff's claim may be legal or equitable. If it be an equitable demand, the court will hear and determine it without the intervention of a jury. If on the contrary, it be the the subject-matter of a common law action, the court will direct that it be tried by jury; and if the claimant shall thus succeed in establishing his demand, he will be compelled to bring his verdict or judgment into the equity suit to have it made a lien against the property. As a matter of course, either party would be entitled to a trial by jury of an action for personal injuries, or for any other common law demand. This right is constitutional and cannot be denied.

The result is that this motion must be sustained as to receiver Morrill. He in no sense now represents the property upon which a lien is sought to be established. He has no interest in defending the property, and no fund with which to make a defense good. No personal action as we have seen can be maintained against him. But we see no reason to rescind the order so far as it affects the property in the hands of the new company. That company took the property under the final order of this court *cum onere*. The court reserved its jurisdiction to enforce liabilities incurred in the management of the property by its receivers, and to enforce them as liens upon the property. The case of the petitioner is a claim for personal injuries; she has a right, if her claim be well founded, to have it established as a lien upon the railway property. Such is the provision of sec. 1309 of the Code of Iowa.

We can see no good reason to deny this petitioner the right to assert her claim in the only way that seems open to her.

The order made at the last term will be so far modified as to require the service of personal notice upon the Central Iowa Railway Company, and rescinded as to receiver Morrill.

McCrary, *Circuit Judge*, concurs.

Kaeiser v. Illinois Central Railroad Company.

(District of Iowa. October, 1881.)

1. Removal of Cause — Citizenship at Time of Commencement of Suit. — Under the act of congress of March 3, 1875, it is necessary that the petition for removal, or the record of the cause in the state court, should affirmatively show that the parties were citizens of different states at the time the suit was commenced.
2. Amendment of Record in Cause Removed. — After the time for removal has passed, the record of the cause can only be amended for the purpose of showing the true state of the record at the time of removal.

On the third day of February, 1880, the plaintiff commenced his action in the district court of Cherokee county, Iowa. Defendant appeared in the state court at the February term, 1880, and at that term the plaintiff filed his petition for removal to this court as follows:

Your petitioner respectfully represents that he is a resident of Polk county, in the state of Iowa; that the defendant, the Illinois Central Railroad Company, is a corporation duly and legally organized under the laws of the state of Illinois; that this suit is a suit at law and of a civil nature, and that the amount in dispute exceeds, exclusive of costs, the sum of five hundred ($500) dollars.

Wherefore, your petitioner prays that an order be made removing this suit to the United States circuit court for the district of Iowa, in accordance with the provisions of section 639 of the Revised Statutes of the United States.

An order of removal was made, and a transcript of the record has been filed in this court. Answer has been filed here, and a demurrer thereto has been argued, but the court, doubting its jurisdiction, called the attention of counsel to the question of the sufficiency of the petition for removal, and requested their views in writing thereon.

These having been furnished, the question has been fully considered by the full bench with the result stated in the following opinion.

Cummins & Cummins and *Berryhill & Henry*, for plaintiff.

John F. Duncombe, for defendant.

McCrary, *Circuit Judge.*— It was settled by the case *Insurance Company* v. *Pechner*, 95 U. S. 183, that, under the twelfth section of the judiciary act of 1789 (embodied in section 639 of the Revised Statutes), a cause cannot be removed from a state to a federal court, unless the petition for removal or the record of the cause affirmatively shows that, at the time of the commencement of the suit, the parties were citizens of different states. The right of removal was held to be statutory, and it was decided that, before a party can avail himself of it to oust the jurisdiction of a state court, he must show upon the record that his case is one which comes within the provisions of the statute. It is also clear upon the authority of the case just cited, as well as upon well settled principles, that the removal of the record of a cause from a state court into this court, where neither the petition for removal nor the record shows that the case is removable, is an utterly void proceeding, which neither confers jurisdiction upon this court nor takes it from the state court.

Under the act above cited, the fact of the citizenship of the parties at the time of the commencement of the suit is jurisdictional, and must, in every case, appear in the record. The fact that it may exist *in pais* is of no importance, since the court cannot look beyond the record to ascertain it, and if it did, could not in that way acquire jurisdiction.

That the parties might have made a showing upon which the case could have been removed cannot avail them, if they have not, in fact, done so.

The rule which requires that in the federal courts all jurisdictional facts shall appear in the record applies with even greater force to causes removed from the state courts, than to those originally commenced in the federal courts. In causes removed the federal court must look to the record, not only

to ascertain whether it has acquired jurisdiction, but also to determine whether another court of co-ordinate powers has been deprived of it. If, therefore, this application to remove had been made under the provisions of said section 639 of the Revised Statutes, the insufficiency of the proceedings to confer jurisdiction upon this court would be very apparent. While the application states it is made under that section, we must suppose that this statement was inadvertently made, since by that section only the defendant can remove a cause on the ground of the citizenship of the parties, while, as already seen, this application is made by the plaintiff.

We will therefore consider the application as made under the act of March 3, 1875, which permits a removal upon the application of either party.

Does this act, like section 639 of the Revised Statutes, require that the record shall disclose the citizenship of the parties at the time of the commencement of the suit?

The two statutes, so far as they bear upon this question, are not identical in phraseology, but are, I think, substantially identical in meaning. The language of the former is: "Any suit commenced in any state court * * * may be removed for trial, etc., when the suit is * * * by a citizen of the state wherein it is brought and against a citizen of another state." The language of the latter is: "Any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, * * * in which there shall be a controversy between citizens of different states, * * * either party may remove," etc.

The words "any suit *commenced*" in the former act, which have been held by the supreme court to fix the time at which it must appear that the parties were citizens of different states, are identical in meaning with the words "hereafter brought," in the act of 1875.

The phrases, "any suit commenced" and "any suit brought," mean precisely the same thing.

And so the language, "when the suit is by a citizen of a

state wherein it is brought, and against a citizen of another state," found in the former law, must, at least so far as the question now under consideration is concerned, be regarded as equivalent to that in the latter act, "a controversy between citizens of different states."

The meaning in both cases is, that the controversy must be between citizens of different states when the suit is commenced or brought.

It follows, that under the act of 1875, as well as the previous law, a case cannot be removed from a state to a federal court, on the ground of citizenship of the parties, unless it appears from the record that at the time the suit was commenced, the parties to it were citizens of different states; and as this does not appear from the record in this case, the removal was unauthorized, and this court has no jurisdiction.

The plaintiff, anticipating this ruling, has moved the court for leave to file an amended transcript. It does not appear whether this is for the purpose of amending the record of the state court so as to conform to the statute, or with a view to show by a more complete transcript, that the record did in fact disclose the citizenship of the parties at the time of the petition for removal.

If the latter is the purpose of the plaintiff, there can be no question as to the propriety of permitting the amendment, since it is without doubt his right to correct the transcript, so that it will show all that appeared of record in the state court when the order of removal was made; but if the purpose is at this time to change the record of the state court so as to show the facts necessary to authorize the removal, a question of great doubt must arise as to the right of the plaintiff in this way and at this time to bring his case within our jurisdiction.

It is clear that assuming that we have before us a complete record up to the present moment, the cause has not been removed; it has remained in contemplation of law pending in the state court.

That court might have proceeded to final judgment, not-

withstanding the proceeding by which a removal has been attempted.

The order of the state court, purporting to remove the cause, did not divest that court of jurisdiction any more than a refusal to make such an order in a case coming within the law would deprive the federal court of jurisdiction.

The question then is, can the cause be now removed, for an amendment of the record at this time so as to show the necessary jurisdictional facts would be equivalent to a removal at this time. With respect to the time of the removal the statute provides that the petition therefor shall be filed in the state court, "before or at the term at which said cause could be first tried;" this means, as has been repeatedly held in this circuit, the term at which by law the cause could first be tried, not necessarily the term at which the parties are ready for trial.

If it be that this term has not yet passed, a removal is still permitted by the statute; but if it has passed, the question is, whether it is not too late to remove the cause, either by a new petition or an amendment of the record.

This question will not necessarily arise until the amended transcript is presented, and is therefore not finally passed upon.

Leave is granted to file an amended transcript, if plaintiff still desires to do so; otherwise the case will be remanded.

MILLER, *Circuit Justice*, concurs.

IRON-SILVER MINING COMPANY *v.* CHEESEMAN *et al.*

(District of Colorado. May, 1881.)

1. MINING LOCATION — PATENT — WHAT THEY CARRY WITH THEM. — The law provides that upon a location properly made, the claimant shall have the vein upon which the location is made, and all other veins and lodes having their top or apex within the lines of the location; and not only within the body of the claim within the lines of the location, but be-

yond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location. But such vein or lode must be *in place*.

2. VEIN, LODE OR LEDGE — DEFINITION OF — EXISTENCE OF, A QUESTION OF FACT.— *Vein, lode and ledge* are the words used in the statute to designate a mineral deposit in rock, and are supposed to be nearly synonymous in meaning. For the purposes of this case, it is sufficient to say that a vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. The existence of such vein or lode is a question of fact to be found by the jury from the evidence before them.
3. ORE BODY "IN PLACE"— WHEN.— If the ore body is continuous to the extent that it may maintain that character, it is in place, whether deposited in that form, or moved to its position bodily with its inclosing walls. Whether the vein is thick or thin is not material, so it is continuous. But if the territory is so broken up, jumbled and mixed, the several parts together, that there is nothing continuous, there is no lode *in place*.

In 1874 A. B. Wood located the Lime lode and mining claim situated in Lake county. The location was made upon a body of mineralized limestone, not upon a lode or vein, as defined by statute. In 1877, upon proceedings had, a patent was issued for the claim to its owners. In the fall of 1877, George Nyce and others located what they called the Smuggler claim and lode. It was situated to the east of, and adjoining the Lime, and before locating it the discoverers sunk a shaft to the depth of forty feet.

G. G. Symes and *Jonas Seelyee*, for plaintiff.

Markham, Patterson, Thomas & Campbell and *J. B. Belford*, for defendants.

HALLETT, *District Judge*, in the course of his charge to the jury, said:

Now, as to the matters which are in issue between the parties. You have observed that there is no conflict upon the surface of the ground, except perhaps it may be as to the small strip along the east side of the Lime claim, and the

west side of the Smuggler claim, as to which there may be conflicting surveys, and which I have stated to you is of no importance in this suit. There is no conflict upon the surface of the ground. The plaintiff, by patent from the government issued to persons who located the claim, holds the absolute title to what has been described before you as the Lime location — and we may say that as to the surface and all that rightfully goes with the surface, the plaintiff is the absolute owner of that territory. We may say also, that as to the Smuggler location, these defendants, although they have not a government title, a title by patent, they are the owners of the surface and all that rightfully goes with the surface of the Smuggler location. So that we have no controversy upon that point.

The law provides that upon a location properly made, and, whenever patent has been issued, we assume in all controversies between individuals that the location is properly made. The law provides that upon a location properly made, the claimant shall have the vein upon which the location is made, and all other veins and lodes having their top or apex in the territory within the lines of the location, and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location. Now, upon that, plaintiff here claims that the lode in controversy or ground in controversy, if there is a lode in it, originates in its territory by its top and apex, and descends upon its dip through and under the other claim. And they have sought, by numerous witnesses and elaborate preparation, to maintain that view before you. And the question, as it is presented to my mind, is a very simple one. Upon that I have written something here for your instruction, which I will read.

Whether in the ground in controversy there is a vein or lode bearing silver, within the meaning of the act of congress, is the principal question in this case. The words used in the

statute to designate a mineral deposit in rock in place are *vein*, *lode* and *ledge*, and these are supposed to be nearly synonymous in meaning. However these words may differ in meaning, it is not important in this case to look for a distinction between them. Nor is it important to define their meaning in a manner that may be accepted in all cases. Any effort so to define them would probably result in failure; but we must seek for a meaning which will enable us to reach a conclusion in this case. So proceeding, it is enough to say that a vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. This is a sufficient description, certainly, as to all bodies of ore that may be found within the lines of the location. As to what may be found in the body of the claims, there being no conflicting location, it is not very important to consider whether it is in place. But the statute, giving the right to pursue the lode beyond the lines of the location in a downward course, refers to veins or lodes *in place*, and whenever such right may be claimed or asserted, it is important to consider whether the vein or lode or that which may be alleged to be such is *in place* within the meaning of the act of congress.

And, first on that point, it may be said, that if the ore body is continuous to the extent that it may maintain that character, it is in place. So far as the ore body is continuous, it must have been deposited in that form or removed bodily, and with its inclosing rocks, to the place in which it may be found. And in either case, as to such continuous ore body, it is proper to say that it is in place within the meaning of the act. And this is the point in controversy between the parties. You will remember that the witnesses for the plaintiff unite in saying that the ore extends with more or less uniformity, and that it is practically continuous from the plaintiff's claim into and through the defendants' claim, so far as it has been explored. The plaintiff produced assayers to testify that samples of ore were taken from all parts of the vein, and found to contain

silver and lead. The maps put before you by plaintiff to show the condition of the ground give the vein as extending from one claim to the other; and clearly that is the position assumed.

On the other hand, defendants contend that the ground in controversy is so broken and the several parts so intermingled, that there is not, and cannot be, a body of ore extending for any considerable distance through any part of it. They have many witnesses to testify to that condition of the ground. They concede that in the ground in controversy there are detached fragments, particles and perhaps masses of ore intermingled with the country rock in the like fragments, particles and masses. But they deny that there is anything like a continuous body or sheet of ore extending from one claim to the other. And this is the question in issue. It is pretty nearly a direct issue between the witnesses for the plaintiff and the witnesses for the defendants, and as you give credit to one party or the other, you should find the fact.

I don't think that I can in any manner make it clearer to you.

I have to say, also, that the burden of proof is upon the plaintiff by a preponderance of testimony to establish the facts which are necessary to support a finding in its favor; and the fact mainly in issue, as I have stated to you, is: What is the condition of this ground extending from one of these claims into the other?

A good deal has been said by the witnesses as to whether there is a top or apex of the vein. That depends, gentlemen, very much as to whether there is any vein or lode there. If you find that there is a vein or lode, to my mind the evidence is clear enough that the top of it is in the Lime location, and if there is none there, of course that which does not exist does not exist in any part — it does not exist by its top nor by its bottom, nor anywhere between the two points.

So that it is, gentlemen, a question of the credibility of witnesses. The testimony is strongly conflicting — I don't

think I have ever known a case in which it was more so, and, as I have said, the question is as to which one of these theories you will accept.

Now, I ought to say to you further, that as to this ore body that I have spoken of, whether it is of greater or less extent — that is, whether it is very thin or very thick — is immaterial. If it extends, as claimed by the plaintiff, from their claim to and into the other, the strength of the vein is not material. Their position is, as you remember, that it extends all the way from their claim to and into the other so far as it has been explored, and it is not material whether it is strong or weak, if it extends in the manner described by them.

But if the territory is, as claimed by the defendant, so broken up, jumbled and mixed, the several parts together, that there is nothing continuous, of course there can be no lode extending from one claim to the other.

Stebbins *v.* The Board of County Commissioners of Pueblo County.

(District of Colorado. ——, 1880.)

1. Statute Construing Statute — When Valid. — A statute construing and explaining a prior statute is valid, in so far, at least, as future transactions are concerned.
2. Statute — Railroad — Stock. — A statute authorizing counties to take stock in railroads is appliable to a railroad duly organized under a subsequent statute.

Miller, *Circuit Justice.* — The case of Stebbins against the Board of County Commissioners is submitted, and at Judge Hallett's request I have examined it and now announce the result. This is a suit on bonds issued by Pueblo county in 1874 in aid of a railroad called the Pueblo & Salt Lake Railroad. The defense to them is that the county had no authority to subscribe to stock in any railroad at that time. An act of

the territorial legislature of 1868 does authorize counties to take stock in railroad companies, but the argument is and the plea is, that at that time there existed no law by which any railroad company could be organized in the manner that this company has been organized; that the act of congress of March 2, 1867, impliedly forbade such organization; and probably that is a fair construction of that act. But by a subsequent act in 1872, congress, as the defendant alleges, undertook to construe that act, and in their construction of it they declare that it should be held to extend to the right to organize railroad companies. It is denied that congress has any right to give a construction to the statute which will bind the court, and therefore it is said that the act of 1867 remains, and this railroad has no competent organization which will enable it to take subscriptions to stock. But in a case which came up concerning taxation under the internal revenue law in the supreme court, a very similar statute, construing a former statute, is made the subject of consideration, and in that case the court held that, while it might not be true that rights existing prior to the explanatory or declaratory statute will be affected by that declaratory statute, yet, inasmuch as congress or any legislative body has a right to pass a law for the future that such a statute shall be held to mean so and so, while it may not affect past transactions, it is equivalent to the passage of a statute of that character for the future; and while it is not necessary for us to decide here whether that declaratory statute would affect any contracts or transactions prior to its passage, it is sufficient to say that after its passage, it became a part of the law of 1867, and it was a declaration by congress that railroad companies might be organized in the manner that this was organized, after that period. That was passed in 1872, and this corporation filed its certificate of organization in 1873; it therefore was organized after the declaratory act, and so far as that is concerned or any other that I know of, it was a valid organization.

It is said, nevertheless, that the act of 1868, which author-

ized the counties to take stock in railroads, was wholly void, because this railroad was not organized according to the law as it then stood; but that act of 1868 was a continuing act. There were railroad corporations then in existence to which it might apply, and it would apply to any future railroad corporation properly organized. Therefore, that act of 1868 authorized the county of Pueblo to subscribe to the stock of a railroad properly organized in 1873.

We hold all the objections taken to the bonds on account of the invalidity of the subscription to be ineffectual; and as that is the only question, the demurrer will be sustained and plea held bad.

MACK & Co. *v.* MCDANIEL.

(Eastern District of Arkansas. October, 1880.)

1. ATTACHMENT — REMOVAL OF PROPERTY OUT OF THE STATE — ARKANSAS STATUTES. — A statute in Arkansas declares a creditor may have an attachment against his debtor who "is about to remove or has removed his property or a material part thereof out of this state, not leaving enough therein to satisfy the plaintiff's claim or the claim of said defendant's creditors." *Held*, that a merchant who did not have property enough to pay his debts, and who invested a material portion of his assets in cotton and shipped it out of the state, was liable to attachment under this statute; that the plaintiff did not have to show the removal was made for a fraudulent purpose; and that the fact that the shipments of cotton out of the state were usual and customary with the defendant and with merchants generally, doing business in the state, constituted no defense to the attachment.

Attachment.

The plaintiff sued out an attachment against the property of the defendant. The affidavit for the attachment was based on the sixth subdivision of section 388, Gantt's Digest, which declares the plaintiff may have an attachment against his debtor who "is about to remove or has removed his property,

or a material part thereof, out of this state, not leaving enough therein to satisfy the plaintiff's claim, or the claim of said defendant's creditors."

The defendant filed an affidavit denying the grounds of attachment. On the trial of this issue it was shown that the defendant was a retail merchant, doing business at Arkadelphia in this state; that at and before the time the attachment was sued out, he was insolvent and wholly unable to pay his debts; that his property consisted chiefly, if not altogether, of a small stock of goods and accounts and notes; that for some time before and up to the date the attachment was sued out, the defendant was converting his goods and credits into cotton, and shipping this cotton out of the state. Within sixty days immediately preceding the date of the attachment, a large and material portion of his property was thus converted into cotton and the cotton shipped out of the state, and at the time and after this cotton was shipped, the defendant did not have property enough in the state to pay his debts, or the debt of the plaintiffs, which was overdue, and was for goods purchased, and which the defendant had declined to pay or secure for want of ability to do so.

It was further shown that it was the custom of merchants to sell goods for cotton and receive payment of debts due them in cotton, and to ship such cotton out of the state in the ordinary course of their business, and that the purchase and shipment of the cotton by the defendant was in the usual course of his business as previously conducted.

Eben W. Kimball, for plaintiffs.

F. W. Compton and *J. M. Moore*, for defendant.

CALDWELL, *District Judge (charging jury).*— Counsel for defendant have argued with earnestness and ability that the shipment of cotton out of the state by the defendant, though such cotton constituted a material part of his property, and though he may not have had left in the state enough property

to satisfy his debts, is not a removal of his property out of the state within the meaning of the statute, because such shipment was made in the usual course of business of the defendant, as a merchant, and was in accordance with the usual course of business of merchants generally in this country.

It is conceded that the shipment of cotton in this way is in accordance with the usual custom of merchants. Undoubtedly a merchant who pays his debts, or has property enough left in the state to pay his debts, may convert a part or all of his capital invested in his business into cotton, and ship it out of the state, and he is not liable to attachment under this section. Such a merchant is not within either the letter or spirit of the statute. But because a solvent merchant who pays his debts, or has property enough outside of his investments in cotton to pay his debts, may do this, does it follow that an insolvent merchant who does not pay his debts, and has not property enough left in the state to pay them, may invest his means in cotton and remove it out of the state, when such cotton constitutes a material part of his property?

Confessedly, the latter case falls within the very letter of the statute; and why not within its meaning and spirit? A construction that would place the solvent merchant in such case on the same plain with the insolvent merchant would nullify the statute, and that, too, not in the interest of merchants conducting their business according to the recognized rules of commercial business and integrity, but in the interest of that class who either will not or cannot comply with the plainest obligations imposed on merchants by law and sound mercantile usage.

It does not lie in the mouth of a merchant who is unable to pay his debts, and who refuses either to pay or secure his commercial paper, and who has not property in the state sufficient to pay his debts, to say that because a solvent merchant may ship his cotton out of the state, that therefore he may do the same, although it may constitute a material part of his property. If a merchant in such a plight may do this, he

may continue the process until the last dollar's worth of his property has assumed the shape of cotton and been shipped out of the state. In such a case a creditor is not, under our statute, bound to stand by and be compelled to take the risk of the proceeds of such property returning to the state, and all other risks incident to such business.

It would not do for a court to say that an insolvent merchant, who refuses to pay or secure his creditors for a want of ability to do so, is carrying on business as merchants usually do. Such a man ceases to be a merchant in the proper acceptation of that term. He does not comply with his legal obligations, nor conform to sound commercial usage and custom in the conduct of his business and in his dealings with his creditors, and has no right, therefore, to demand that the law and his creditors shall treat him in the same manner that a solvent merchant, doing business regularly as merchants usually do, would be treated. He cannot repudiate the duties and obligations imposed on him as a debtor and merchant, and at the same time claim the legal rights accorded to a debtor who discharges, or is willing or able to discharge, his obligations to his creditors.

While the single fact of insolvency of a merchant is not ground of attachment, there certainly is nothing in the law or sound public policy to encourage insolvent men to conduct a commercial business, where it is obvious that such business can only be carried on at the expense of unsuspecting or victimized creditors. If an insolvent man will conduct business as a merchant, he cannot, on any pretext, remove a material part of his property out of the state without rendering himself liable to the process of attachment. An insolvent debtor may make a *bona fide* sale of all or any portion of his property within the state, but when he sends a material portion of his property out of the state for sale or on speculation for his own account, he renders himself obnoxious to process under this statute. Insolvent merchants have no greater privileges under this statute than any other insolvent debtor. Every

debtor who removes his property or a material part of it out of the state, not leaving enough to satisfy the claims of his creditors, is within the statute, whether he be a merchant, farmer or lawyer, and whether the property so removed be cotton, cattle, horses or any other kind of movable property. And the mode in which the debtor acquired the property can make no difference. Nor is the motive for the removal material. The law does not require that the removal shall be made with a fraudulent intent or for a fraudulent purpose. There is nothing unreasonable or harsh in this rule, for an insolvent man has no legal or moral right to insist on the privilege of putting his diminished and insufficient assets to the hazards of shipment beyond the state, when it was obvious all risks incident to such action have to be taken and borne by his creditors.

No general rule of interpretation can be framed applicable to every state of case that may arise under this statute; and it would not be proper or safe to enumerate supposed cases that would be within or without the statute.

It is sufficient to give the jury an exposition of the statute applicable to the facts of this case. Other cases depending on a different state of facts will be decided when they arise. The jury are therefore instructed that if they find from the evidence that the defendant owed the plaintiffs the debt sued for in this action, and that it was due, and that the defendant was in the habit, in the course of his business as a merchant, of investing his capital and credit in cotton and shipping the same out of the state, and that the cotton thus shipped within a period of about sixty days, immediately preceding the date of the writ in this case, constituted a material portion of the defendant's property, and that after such shipment the defendant did not have enough property left in the state to satisfy his debts, then the attachment was rightfully sued out, without reference to the motive or intention of the defendant in shipping such cotton. But if the cotton so shipped did not constitute a material portion of his property, or if he had

property left in the state after its shipment, sufficient to satisfy his debts, then the issue must be found for defendant.

Verdict and judgment sustaining the attachment.

Northern Pacific Railroad Company *v.* Burlington & Missouri Railroad Company and others.

(District of Minnesota. ——, 1880.)

1. Injunction — Attempt to Take Permanent Possession of Land for Public Use — Irreparable Injury. — An attempt to take permanent possession of land for public use, without the assent of the owner, express or implied, and without payment or tender of damages in advance, would, if consummated, be in the nature of an irreparable injury, to prevent which an injunction would ordinarily be granted. *Held*, in this case, that the equities of the bill were not fully denied by the answer, and a motion to dissolve the injunction could not therefore prevail.

Motion to dissolve preliminary injunction.

Gilman & Clough, for plaintiff.

Bigelow, Flandrau & Clark, for defendants.

Nelson, *District Judge.*— It is well settled that the attempt to take permanent possession of land for public use, without the assent of the owner, express or implied, and without payment or tender of damages in advance, would, if consummated, be in the nature of an irreparable injury, to prevent which an injunction will ordinarily be granted. See High on Injunctions, § 391; 30 Wis. 107; 2 Dillon, 376.

The answer of defendants does not deny that such attempt was made, and the allegations of the bill in that respect are not fully met, so as to warrant the enforcement of the general rule, that when all the equities of the bill are fully denied by the answer the injunction must fall.

The charter of the Northern Pacific Railroad Company

(section 7) authorizes the company to enter upon any land necessary for the construction and working of its road, not to exceed two hundred feet in width on each side of the line; and in case the owner of the land and the company cannot agree as to the value of the premises taken, provision is made for an appraisal to be initiated by *either party*. Usually the railroad company only is authorized to commence proceedings. When the company, under such a charter, takes possession of land for construction before proceedings are commenced to ascertain the compensation to be paid, it is not a trespasser, and an injunction even would not be allowed to prevent the construction of its road. Mills on Eminent Domain, § 90, and authorities cited. This rule, however, would not prevail where the right of eminent domain is granted to corporations by the legislature of a state whose constitution requires compensation to be first paid or secured before the property is taken.

The right of eminent domain is conferred upon the plaintiff by congress under the constitution of the United States. The state of Minnesota assented to the right to so exercise it. See act of Minnesota legislature of March 2, 1865.

Under the constitution of the United States just compensation, where private property is taken for public use, is not in terms required to be made before entry. Authorities are numerous that the party condemning may thus enter, even where no right is given by the charter to the owner to initiate proceedings for assessment of damages.

But I think the facts in this case, aside from the law as laid down, show a waiver of payment in advance of the entry and construction of the road by Edward Schriber, the owner, and his heirs. The route of the Northern Pacific Railroad Company was finally located over the *locus in quo* November 21, 1821. Edward Schriber purchased it in the month of January previous from the government. The railroad was constructed in the summer of 1872. There was no person living upon the premises at the time, and it was uncultivated. The land being vacant at the time of entry by the plaintiff, on

the definite location of the route, and the owner residing in the state of Pennsylvania, would not the clause in the company's charter, which authorizes it to enter upon vacant and unoccupied land, justify the entry? But conceding it would not, yet, when the entry was made and the road in operation, an acquiescence for the shortest period is sufficient to warrant a belief that the owner intends to waive all claims except, perhaps, for the damages, which could be assessed as well after as before entry. Certainly the earliest notification to the company, according to the averments of the answer, was long after the construction by the plaintiff of its road over the land, and, though it is alleged in the answer that neither Edward Schriber in his lifetime, nor his heirs, knew until 1873 that the plaintiff had constructed its road over this land, still, up to the time of the conveyance of their interest in the strip which crosses the Northern Pacific Railroad, in 1880, they only notified the plaintiff that they held it responsible for the trespass and use of the land, and have never commenced any proceedings to assert their rights.

The plaintiff has been in possession of the land since November, 1871, and operating its road since 1872. Under such circumstances a license is implied.

It is conceded by defendants' counsel that the Barnesville and Moorhead Railroad Company, as owner of a strip purchased from Schriber's heirs, running across complainant's track, and the land necessary for operating its road, could not maintain ejectment. If the company is not a trespasser and cannot be ousted by ejectment, and an injunction would not issue, it has a right of property as well as a license. Its title would be complete and perfect on the payment of compensation when ascertained.

The plaintiff insists that the right to compensation is barred under section 7 of its charter, through default of Schriber or his heirs to claim such compensation within six years after the opening of its road, and authorities are not wanting to sustain this view (1 Redfield on Railways, 300, and note); but it

is not necessary to decide this now. Conceding the right to enforce a claim for compensation, the plaintiff still has a property interest which can only be taken by the defendants deriving title with knowledge of the situation, on strict compliance with the law of Minnesota. The law does not authorize either party to initiate proceedings to condemn; it allows only the one desiring the land.

No award has been made — no compensation ascertained. Unless consent or license was given to defendants to enter upon the plaintiff's right of way and track, and construct the crossing, in view of the constitution and laws of Minnesota by virtue of which only can it exercise the right, damages must first be appraised and paid or secured previous to entry. See Cooley's Constitutional Limitations, title, "Eminent Domain;" 30 Wis. 105; 35 Mich. 265,— the latter a railway-crossing case.

No damages having been appraised, has permission or license been granted so as to prevent the plaintiff from resisting the occupancy of its land and track for that purpose?

The amended answer of defendants sets up a license to make a crossing over plaintiff's track, given by it, and alleges that the plaintiff also by representations encouraged the building of defendants' road, and gave it to understand that it would assist in effecting the crossing, and interpose no objections thereto. The answer is sworn to by R. B. Angus, James J. Hill and A. B. Stickney; and an affidavit sworn to by R. B. Angus, which was read on the hearing of the original application for injunction, purports to give in some detail what these representations were, and he says H. E. Sargent, the plaintiff's general manager, knew that the defendants intended to cross plaintiff's line, and made no objection to the manner or the point at which said crossing was to be made, but at his own request was furnished by the defendants' chief engineer with a description of said proposed crossing, and a diagram and model of a frog which would be required at said point, and that said Sargent then agreed and promised to construct said frog at the shops of said plaintiff at Brainerd, in this state.

The affidavits of the president and secretary of the company and of the general manager, denying any consent to the intended crossing, are read in reply, and a copy of a letter written by one of the defendants, Stickney, superintendent of construction of the Barnesville & Moorhead Railroad, dated September 3, 1880, and addressed to H. E. Sargent, general manager of the Northern Pacific Railroad, is also produced, purporting to inclose a tracing of the proposed crossing, with a request that the crossing frogs should be made at the plaintiff's shops and charged to the Barnesville & Moorhead Railroad Company; also a copy of a letter, dated September 9, 1880, addressed to J. J. Hill, general manager of the St. Paul, Minneapolis & Manitoba Railway, and one of the principal officers of the Barnesville & Moorhead Railroad Company, by Sargent, stating that in the matter of the Barnesville & Moorhead line crossing the Northern Pacific near Moorhead, "I am directed to forbid your doing so, or entering the Northern Pacific Railroad Company's right of way, which is a strip two hundred feet wide on each side of the main track."

This was certainly a formal revocation of any parol license to enter upon the Northern Pacific track or right of way, conceding that consent or license was given, which is very doubtful. Again, the power of the general manager of the Northern Pacific Railroad to bind the company in a matter of this kind is not clear, but if he could grant such license, as is claimed by defendants, still the law is well settled that a parol license can be revoked before acted upon, which is the case here. Bigelow on Estoppel, 227–8; 28 N. Y. 297; 1 Selden, 568.

I am satisfied upon consideration of the case, after the full and able argument of counsel on both sides, that the motion to dissolve the injunction must be denied, and it is so ordered.

WORTH and others *v.* STEAM-BOAT LIONESS No. 2.

(Eastern District of Missouri. June, 1880.)

1. MARINER — IMPLIED CONTRACT. — In the absence of shipping articles, there is an implied contract that the mariner will be returned to the port of shipment.
2. SAME — INTERNAL NAVIGATION — RETURN BY RAIL. — A mariner will not be justified in waiting until spring for a vessel to take him back to the port of shipment, where internal navigation has been closed by ice, and he has been discharged at a port whence he could return by rail.
3. SAME — COMPENSATION. — In such case, where the mariner has not been employed for a specific period of time, he is entitled, by way of compensation, to the amount of his necessary transportation and expenses, together with his rate of wages from the date of his discharge to the date of his arrival at the port of shipment.

In admiralty.

H. E. Mills and *J. P. Dawson*, for libelants.

H. A. & A. C. Clover, for claimants.

TREAT, *District Judge.* — The demands are by mariners, under shipping contracts. The libelants shipped respectively at Pittsburg and Louisville, without shipping articles or any express statement as to the proposed voyage. All parties knew that the vessel was engaged in towing claimant's barges from one point on the Ohio river to another point on the same river, and also to different points on the Mississippi river. The vessel, in the course of her voyaging, encountered ice in the Mississippi river and laid up at Bushburg, about twenty miles below St. Louis. As it was uncertain how long she might be detained, the voyage was broken up and the libelants were discharged, receiving the wages earned to that time. They insisted upon a sum additional, sufficient to return them to their respective ports of shipment, which request was refused. The libels are to recover the necessary expenses of their return, and for the additional sum of $30 each.

It is obvious that the detention of the crew on full pay until the winter season ended, or the river was clear of ice, might have been very expensive to the vessel; yet their right to be transported to their port of shipment is well settled. A mariner who ships for a voyage cannot be discharged without cause in a foreign port without the known legal results. When there are no shipping articles, and no prescribed voyage stated, the implied contract or legal presumption is that he is to be returned to the port of shipment. Were this otherwise, most disastrous consequences might often result. The doctrines as to sea-going vessels are well settled, and the principles on which they have been asserted apply to internal navigation, in the absence of any congressional legislation upon the subject. If a mariner shipped on a vessel bound to Fort Benton, Montana, it could not be fairly urged that, in the absence of an express agreement, he could quit the vessel at Fort Benton, and with impunity disable her from returning; nor, on the other hand, that he could be left in that distant region without means of returning. The duties are reciprocal.

This court had occasion years ago to pass upon a like question, occurring upon the upper Missouri. Reported cases seem not to be fully in accord; yet, when carefully considered, are not different in principle. A mariner wrongfully discharged may work his passage home in the same capacity as that for which he was originally engaged, and thus save the cost of transportation to the owners of the vessel. In the absence of such an opportunity he may return as a passenger. In sea-going voyages, where the destination is to a foreign port specified, and a direct return to the port of shipment, it has been decided that his wages should be paid up to the time of the vessel's return, and it has also been decided that his wages should run to the date of his return in another vessel. Circumstances may make one or the other of these rulings applicable as to foreign voyages.

In the internal navigation of this country, it is evident that no arbitrary rule can obtain in justice to the interests involved,

for, as in the case under consideration, the return could not be made in a reasonable time on a vessel, because navigation was closed by ice. The mariners, being discharged at a port whence by railroad they could return home in a few days, would not have been justified in waiting until spring for a vessel to take them to their port of shipment. Hence, the rule for their compensation is the amount of their necessary transportation and expenses, together with their rate of wages from date of discharge to their arrival at the port of shipment; for the contracts were not for a specified time of employment.

It might have been that their term of service would have ended sooner than it did; for the voyage might have been made only to Cincinnati or Louisville and back to Pittsburg. It must, however, be always considered that mariners stand in the relation of wards of court, and that, inasmuch as it is in the power of the master and owners to make their contracts definite by shipping articles or otherwise, the legal presumption arises, if they do not specify in their agreements to the contrary. The differences in river navigation from sea-going voyages have been often considered in this court, and this case furnishes an apt illustration of what maritime principles require. From various causes a steam-boat may have to procure additional mariners in different stages of her route, instead of an entire crew for the whole voyage; yet the same rule must apply to each.

It is very easy for officers to state to a mariner definitely what his employment is to be, whether to be discharged at the port of arrival or otherwise, if they wish to limit his term of service or reserve a right to discharge him before his return to the port of shipment. *Brown* v. *Lull*, 2 Sum. 441, 449; *In re Glocester*, 2 Pet. Adm. 403, 405; *In re Rovena*, 1 Ware, 309; *The Exeter*, 2 Rob. Adm. 261; *Beaver*, 3 Rob. Adm. 92; *Sullivan* v. *Morgan*, 11 Johns. (66) 67; *Hoyt* v. *Wildfire*, 3 Johns. 518, 520; 28 Mo. 280; id. 338; *Rice* v. *Polly & Kitty*, 2 Pet. Adm. 420, 423; *The Union*, Blatchf. & H. 568; *Farrell* v. *French*, id. 275; *Emerson* v. *Howland*, 1 Mason, 45;

Nevitt v. *Clarke*, Olc. 316; *Jones* v. *Sears*, 2 Sprague, 43; *Brunent* v. *Taber*, 1 Sprague, 243; *Hutchinson* v. *Coombs*, 1 Ware, 65; *Sheffield* v. *Page*, 1 Sprague, 285, 288; *Sheffield* v. *Page*, 2 Curt. C. C. 377; *Hunt* v. *Colburn*, 1 Sprague, 215; *Nimrod*, 1 Ware, 9; *Anderson* v. *Solon*, Crabbe, Adm. 17; *The Gazelle*, 1 Sprague, 378; *Burke* v. *Buttmann*, 1 Lowell, 191; *The Elizabeth*, 2 Dodson, 402, 412; *Brooks* v. *Dorr*, 2 Mass. 39; *The John Martin*, 2 Abb. U. S. Rep. 172, 181; *The B. F. Bruce*, Newberry, 539; *The Crusader*, 1 Ware, 437; *White* v. *Atkins*, 8 Cush. 367; *Rossiter* v. *Cooper*, 23 Vt. 522; *Heim* v. *Wolf*, 1 E. D. Smith, 70.

Mack & Co. *v.* Lancashire Ins. Co. and others.

(Eastern District of Missouri. ———, 1880.)

1. Fire Insurance — Action on Policy — Evidence. — In an action upon an insurance policy the plaintiff is bound, in the absence of any admission by the defendant, to establish, by a preponderance of the evidence, (1) the execution of the policy; (2) the total or partial destruction of the insured property; (3) the amount of the loss or value of the insured property destroyed; (4) and such notice and preliminary proof of loss as the policy requires.
2. Same — "Actual Cash Value." — In such case the term "actual cash value" means the sum of money the insured goods would have brought for cash, at the market price, at the time when, and place where they were destroyed.
3. Same — Fraudulent Claim. — In order to establish the fact of a fraudulent claim, it must appear (1) that there was a false statement in the preliminary proof as to the value of the goods destroyed, and (2) that such false statement was made with knowledge that it was false, and with the intent to defraud the defendant by deceiving him as to the value of the goods.
4. Same — Same. — The mere fact that the loss is less than that stated in the preliminary proof would not be sufficient to establish fraud, though if the discrepancy between the true value and that stated by the insured is large, it would be some evidence bearing upon the issue of fraud.
5. Same — Arson — Evidence. — In a civil case the fact of arson need not

be established beyond all reasonable doubt, but it must nevertheless be established by a clear preponderance of all the evidence adduced.

6. SAME — VEXATIOUS DELAY — DAMAGES — EVIDENCE.— In order to recover damages for vexatious delay in the payment of a policy, it must be shown that there was no reasonable ground for contesting either the validity or the amount of the claim.

Noble & Orrick, for plaintiffs.

O. B. Sansum, for defendant.

MCCRARY, *Circuit Judge (charging jury).*—These cases being all of like nature, and relating to the same questions, have been by the order of the court consolidated for the purpose of the trial, and are now to be submitted to you for your verdict upon the facts and in accordance with the law as given to you by the court. The plaintiff in an action of this character is, in the absence of any admission by defendant, bound to establish by a preponderance of evidence — *First*, the execution of the contract or policy of insurance sued on; *second*, the destruction, total or partial, of the property insured; *third*, the amount of the loss, or in other words, the value of the insured property destroyed; *fourth*, that such notice and preliminary proof of loss as the policy requires has been given.

In these cases the defendants by their answers have admitted the execution of the contract or policy sued on, as well as the destruction by fire, as alleged by plaintiffs, of the property insured. They have also admitted that notice and proof of loss were duly given in all the cases sued on, to which your attention will be called hereafter. The defendants say that the property destroyed (a stock of clothing) was not of the actual cash value stated by plaintiffs in their petitions, and this presents the first issue of facts for you to determine. You are to consider and decide, in the light of all the evidence, what was the fair and reasonable cash value of the property in the city of St. Louis on the fourth of April, 1879, when the fire occurred. In determining this question, you will consider the character and quality of the goods, their cost, their condition

the state of the market, any decline or advance in value after purchase and before the fire, the invoices previously made and the proof of subsequent purchases, as well as all the facts and circumstances developed in the evidence and bearing upon the subject, and from all the evidence you will ascertain and by your verdict decide, what was the actual cash value of the goods in the store of the plaintiffs at the time of the fire and destroyed thereby. By the term "actual cash value," I mean the sum of money the goods would have brought if sold in the city of St. Louis, on the fourth day of April, 1879, for cash, at the market price. Having thus ascertained and fixed the value of the property destroyed, your verdict will be for the plaintiffs in the sum so fixed, unless you find for defendants on one or more of the issues presented by the answers, to which your attention will now be called.

The defendants, in their several answers, allege that the plaintiffs made, under oath, a false and fraudulent claim, representing their loss to have been $78,219.82, while in truth and fact their loss was only $48,000, as plaintiffs well knew, and that this false statement was made with intent to induce defendants to believe that the value of the stock was larger than it was in fact, and was therefore a violation of one of the conditions of the policy. It is for you to determine whether this defense is established by the preponderance of the evidence. In order to find for defendants upon this issue, you must believe from the evidence that the statements made under oath by plaintiffs in their preliminary proofs, as to the value of their stock and the amount of their loss, were in some material point false, and also that they were fraudulent; that is to say, intentionally false, or made with the purpose of deceiving and defrauding. A claim honestly made will not render the policy void, even though such claim be erroneous by reason of some degree of exaggeration or over-estimate; but if the insured made, with reference to the quality or value of the goods insured, a claim which he knew to be false and unjust, then he cannot recover anything.

In the event that you should find the loss to be less than that stated by the insured in their preliminary proof, that mere fact would not be sufficient to sustain the defense, though if the discrepancy between the true value and that stated by the insured in their preliminary proofs is large, this would be evidence bearing upon the issue of fraud, to be considered by the jury for what it is worth. In other words, you will perceive that the defendants, in order to succeed upon this issue, must satisfy you from the evidence: *First*, that there was a false statement in the preliminary proof as to the value of the goods destroyed; and *second*, that such false statement was made with knowledge that it was false, and with the intent to defraud the defendants by deceiving them as to the value of the goods. The value of a large stock of clothing at a particular date is of course to some extent a matter of opinion and of estimate, and it is not to be expected that different persons would fix it at exactly the same amount. Different persons might honestly differ as to what would be a true valuation. The question for you to determine in deciding this issue, therefore, is not whether the value fixed by plaintiffs was the true value of the goods, but whether it was an intentionally false estimate and claim. Upon this question, which is one purely of fact, you are the sole and exclusive judges.

If you find that there was no exaggeration of the amount of the loss, you will of course have no occasion to consider the other question; but if you find that there was an exaggerated claim, then you will inquire as to the intent.

In case No. 1489, against the Glens Falls Insurance Company, there is an allegation in the answer that the preliminary proof was not made in time; but the court instructs you that this defense was waived, if the defendant or its agent had possession of the books of the plaintiffs, from which the loss was to be ascertained, and if by reason of such possession of said books the plaintiffs were deprived of the opportunity to make proof in time. It was also waived if the agent of the defendant agreed, when he took possession of the books, to

waive the issue. As the defendants have introduced no testimony to contradict plaintiffs' proof upon this point, which was full and explicit, you will of course find this issue for the plaintiffs.

This leaves for your consideration the further defense that the loss "was caused, occasioned and brought about fraudulently by the direct agency, procurement, contrivance and direction of the plaintiffs." This is equivalent to an allegation that the plaintiffs are responsible for the fire which resulted in the destruction of their property. This is, of course, a perfect defense if proved; but before you can find for the defendants upon this issue, you must be satisfied from the evidence that the charge is true. The fact of arson may be established by circumstances, but they must be such as to establish the main fact with reasonable certainty. A mere suspicion is not enough. The jury must be satisfied that the fact is established by a clear preponderance of the evidence adduced before them.

In a case where the evidence is evenly balanced, or the jury is in doubt as to what the truth is on that point, there is not a preponderance of evidence. The defendants are not bound in a case like the present, as they would be in a criminal prosecution for arson, to prove the fact beyond all reasonable doubt, but they are required to produce proof sufficient to clearly satisfy the jury that the charge is true.

The jury will, if they find for plaintiffs, find and state in their verdict the value of the entire stock destroyed, with interest, as hereinafter stated, and damages, if any are allowed. The court will, if you so find, afterwards determine the amount of the recovery in each case and render judgment accordingly; the parties, by their counsel, having consented to this form.

The plaintiffs claim that they are entitled to damages, in addition to the value of their property destroyed, on account of vexatious delay caused by the conduct of the defendants. To establish this claim the plaintiffs must show that the de-

fendants had not reasonable ground for contesting either the validity or the amount of the claim. If you find from the evidence that there was vexatious delay within this definition, you may add to the value of the property destroyed not exceeding ten per centum of the amount of such loss, and include such addition in your verdict. The burden is upon the plaintiffs to prove the fact of vexatious delay by a preponderance of testimony.

If the jury finds for the plaintiffs, then it will add to the amount of loss found, interest at six per cent. per annum from the fourteenth day of March, 1879, when the demand is shown by the uncontradicted testimony to have been made.

In the Matter of the Petition of the Barnesville & Moorhead Railway Company, etc.

(District of Minnesota. October, 1880.)

1. Removal — Jurisdiction — Time When Cause Can Proceed. — In the case of a removal the jurisdiction of the federal court is not complete, so as to hear and determine the cause, before the day prescribed by the statute, although a transcript has been filed.

Application to proceed with the condemnation of a railroad and the necessary land.

Bigelow, Flandrau & Clark and *R. B. Galusha*, for petitioner.

Gilman & Clough, for respondent, the Northern Pacific Railroad Company.

Nelson, *District Judge.*— The Barnesville & Moorhead Railway Company, organized under the general railroad laws of the state of Minnesota, commenced proceedings under title 1, *c.* 34, Young's Minn. St., to obtain by condemnation a cross-

ing over the track of the Northern Pacific road at or near Moorhead, in the county of Clay, and the land necessary for that purpose. The power to acquire by condemnation a crossing is granted by chapter 80, § 1, Minnesota Session Laws of 1879, and by section 3, the proceedings to obtain the land shall be instituted and conducted in the same manner as other similar proceedings by railroad companies under the general statutes above alluded to, with some reservations which are not important here.

A petition stating the object and amount of land, etc., to be taken was filed in accordance with the statutory provisions for the appointment of three commissioners to ascertain and report on the compensation, and presented to the district court of the state of Minnesota in and for the county where the land and crossing are situated, and proper notice given as required. At the time of the hearing, September 28, 1880, the Northern Pacific Railroad Company appeared by counsel and filed a petition stating, *inter alia*, that it will suffer damages to a greater amount than $1,000; that it is a company created and existing by virtue of certain acts of the congress of the United States, attaching them with the act of the state of Minnesota, giving the company the right to build a railroad across the state, to its petition; and alleges "that it has a defense arising under the laws of the United States, to wit: that it is a corporation of the United States created and existing as aforesaid, and holds its right of way, rights and property under the act of congress aforesaid, and that the state of Minnesota has no power to confer upon any person or corporation the right to enter upon the same or take the same in the manner proposed by the said proceedings; wherefore your petitioner, the Northern Pacific Railroad Company, prays that the said proceedings be removed into the circuit court of the United States for the district of Minnesota, and that this court proceed no further therein."

A bond with sureties that the Northern Pacific Railroad Company will enter in the United States circuit court on the

first day of the next session thereof hereafter to be holden, a copy of the record in the said suit and proceeding, etc., accompanied the petition and was filed.

The district court of the state made the following order:

"Ordered that the application of the Northern Pacific Railroad Company to remove the said proceedings into the circuit court of the United States for the district of Minnesota be and the same hereby is granted, and that no further proceedings in this matter be had in this court. By the court.

"October 6, 1880. O. P. STEARNS, Judge."

The Barnesville & Moorhead Railway Company have procured a properly certified copy of the record in the state court and filed it in the United States circuit court, October 18, 1880, the next regular session of the court being on the second Monday of December, and, on this copy of the record, asks the court to proceed with the condemnation of the crossing and the necessary land, etc.

The Northern Pacific Railroad Company objects to the jurisdiction of the court to proceed in the matter at this time. The right is given by the statutes to the Northern Pacific Railroad Company, whose land is to be condemned and track crossed, to show cause, on the hearing for the appointment of commissioners, against granting the prayer of the petition, and any of the facts therein contained may be disproved and the court shall hear the proofs and allegations of the parties; and if satisfied that the public interests require the crossing to be made and the lands, etc., to be taken are necessary for the purpose, it shall make an order appointing three commissioners to ascertain the amount to be paid by the petitioning corporation to persons interested. An appeal is allowed from this appraisement of the commissioners, to be prosecuted in the court where their report is filed, and it is to be submitted to a jury to re-assess the damages awarded, etc. Whether the proceeding, as shown by the record presented, is essentially political in its character and not judicial, and whether it is a suit within the meaning of the second section of the removal

act of 1875, it is not necessary at this time to determine. All parties appear to agree that it is a suit or proceeding which can be removed from the state court, and I shall not on this application consider the question.

The only point to be decided is, has the federal court at this time jurisdiction so as to proceed with the matter? I am inclined to the opinion that on filing the petition in the state court, making a proper case for removal, and executing and filing the bond required, jurisdiction attaches in the circuit court, and when at any time it is known by the federal court that such steps have been taken in the state court for removal, either by a copy of the record being filed or entered therein before the time required by the statute, many incidental proceedings may be taken, and provisional remedies, as attachments, etc., may be granted on motion, as could be done after the commencement of suit by original process and appearance of the defendant; but the cause cannot proceed until the limited time has expired and the transcript entered. Such interpretation of the removal acts has support in the opinion of the supreme court of the United States when construing section 641 of the Revised Statutes, involved in the case of *Virginia* v. *Rives*, 100 U. S. 316. There is a declaration in that section similar to the one in the act of 1875 that, "upon filing of the petition (no bond being required) all further proceedings in the state court shall cease." * * * The language of the act of 1875 is: "The state court shall accept the petition and bond, and proceed no further in such suit;" and the court say, on page 317: "It is therefore a material inquiry whether the petition of the defendants sets forth such facts as made a case for removal, and consequently arrested the jurisdiction of the state court and transferred it to the federal court;" thus implying that the federal court acquired jurisdiction *ipso facto* on filing petition and bond.

So, also, in the *Removal Cases*, 100 U. S. 475, the court say: "While the act of congress requires security that the transcript shall be filed on the first day, it nowhere appears that

the circuit court is to be deprived of jurisdiction, if by accident the party is delayed until a later day in the term. If the circuit court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete and the removal properly effected." I understand, from the opinions of the court in these cases, that when the jurisdiction of the state court ceases that of the federal court attaches for some purposes, on entering a copy of the record, so that the court may know the facts; but the jurisdiction of the federal court is not complete, so as to hear and determine the cause, although a transcript is filed, until on the day prescribed in the statute, or after, if the court accepts it. See Dillon on Removal of Causes, 71; *Mahoney Mining Co.* v. *Bennett*, 4 Sawyer, 289.

Inasmuch as the next proceeding in the case in hand is for the defendant to contest the facts in the petition, I am of the opinion the court cannot at this time entertain it.

Application to proceed in the matter denied.

BROOKS and others *v.* FARWELL and others.

(District of Colorado. October, 1880.)

1. REMOVAL — REVIEW. — Questions passed upon in a state court cannot be reviewed upon the removal of the cause to the circuit court.
2. PRACTICE — SERVICE OF PROCESS — NON-RESIDENT. — A party going into another state as a witness, or as a party under process of a court, to attend upon the trial of a cause, is exempt from process in such state while he is necessarily attending there in respect to such trial. *Prrker* v. *Hotchkiss*, 1 Wall. Jr. 269; *The Juneau Bank* v. *McSpedan*, 5 Biss. 64.

HALLETT, *District Judge.* — Brooks and the Purdy Silver Mining Company brought suit in the district court of Arapahoe county, against John V. Farwell and another, in March

last. Farwell appeared and filed a motion to quash the summons or service of the summons, alleging in an affidavit accompanying the motion that he had been in attendance upon court in another suit brought by one of the plaintiffs, and that he was a resident and citizen of the state of Illinois, and had come here necessarily for that purpose, and so was exempt from service while in attendance on the court. Upon hearing that motion the court denied it, but gave leave to the defendant to set up the same facts in an answer in the nature, it is said, of a plea in abatement. Thereafter the cause was removed into this court, and the plaintiff now asks for judgment, claiming that the answer cannot be received; that it is not according to the course of pleading under the code; that any answer that may be filed must go to the complaint, and that nothing can be averred against the summons or service of the summons, by way of answer. As to that question, it must be assumed that that was passed upon in the district court of Arapahoe county, in overruling the motion to quash the service of the summons. In allowing the defendant to file an answer setting up the same matters, the court must have held that that was the proper practice — the proper course of procedure. That being decided there cannot be reviewed or in any manner set aside in this court. We do not, on the removal of a cause from a court of the state, review or attempt to reverse any proceedings that may have been had there before the removal of the cause into this court. As to all questions that are passed upon in the state court before the removal of the cause, they are fully and finally determined so far as this court is concerned, and can only be reviewed in the supreme court of the United States, if there be error in them; so that this plea is to be received as well pleaded here, and as to the matter of the plea there can be no doubt as to its sufficiency. The authorities are clear to the point that a party going into another state as a witness, or as a party under process of a court, to attend upon the trial of a cause, is exempt from process in such state while he is necessarily attend-

ing there in respect to such trial. Having been brought into such foreign state by process of law, he cannot, while there, be called to answer in another action. *Parker* v. *Hotchkiss*, 1 Wall. Jr. 269; *The Juneau Bank* v. *McSpedan*, 5 Biss. 64. The motion will be denied.

HOYT and others *v.* WRIGHT.

(District of Colorado. October, 1880.)

1. REMOVAL — JURISDICTION — PLEADING.— Want of jurisdiction must be pleaded where an objection to the removal of a cause is made upon that ground, and such defect is not apparent upon the face of the record in the state court, or the petition for removal.
2. SAME — SAME — CONVEYANCE BY PARTY TO SUIT.— A *bona fide* conveyance of the property in controversy by a party to the suit, for the express purpose of conferring jurisdiction upon the federal court, will furnish no ground for remanding a cause to a state court.

Motion to remand.

HALLETT, *District Judge.*— In cases removed from a court of the state, if there is in the record, either in the state court or in the petition for removal, anything showing want of jurisdiction in this court, the party objecting to the removal may rely upon that by motion to have the cause remanded. If, taking the facts appearing in the record and petition to be true, this court has jurisdiction, the party objecting to the jurisdiction must make his objection by plea to the jurisdiction,— that is, he must allege the facts in a manner in which issue may be joined, and according to the course and practice of the court, so that they may be properly determined,— and it has been determined by the supreme court that the method of doing that is by plea to the jurisdiction, and in that way only. Upon such a plea we know what course is to be pursued; we know how to consider it, how to ascertain its sufficiency, and

how, if issue be joined upon it, to reach a conclusion as to the matter of fact.

This paper is called a petition to remand, and in it the pleader sets up a matter which is not shown in the record, and as a pleading it is something that we know nothing about, and we could not take any notice of it, if the matters alleged in it were such as would be sufficient to remand the cause, if true; but the matter stated in the petition is not in itself a ground for remanding the case. It is alleged that Mr. Mills was a party to this suit in the state court, and an owner in the property in controversy; that he conveyed his interest in the property to one of his associates, one of the plaintiffs, and thereupon moved on behalf of the other plaintiffs to transfer the cause to this court; that this was done for the purpose of conferring jurisdiction upon this court; "that the sale and conveyance by Mr. Mills to his co-plaintiff, Wright, and the discontinuance of the action as to himself, in the district court of the county of Ouray and state of Colorado, was made for the sole and avowed purpose of giving this court jurisdiction of said case." If that is true exactly as stated, it is no ground for remanding the case, provided the sale was in fact made. A party having property may sell it for the express purpose of enabling his vendee to sue in this court, and if it be a real sale and not a sham, that is no objection to the jurisdiction; but if the transfer is merely colorable,—if, notwithstanding the transfer, he still retains his interest in the property, and is still the owner of it, then it would be a collusive proceeding, which of course would not confer jurisdiction. The question in such a transaction as this is, whether there was a real transfer of the interest by which the vendee in the conveyance obtained a title, or whether it was colorable merely; whether Mr. Mills still retains his interest in it. If, by plea to the jurisdiction in the form which is prescribed by law, the defendant here is able to allege that Mr. Mills, being a party to this suit in the state court, without consideration, or in any way which was not effective to transfer his interest, and merely for the purpose of

giving this court jurisdiction, transferred his interest to one of the other parties, and thereupon caused the suit to be removed, that may be ground for remanding; otherwise we must retain the case here. I do not see that any order is to be made here; we take no notice whatever of the petition.

NORTHERN PACIFIC RAILROAD COMPANY *v.* BARNESVILLE & MOORHEAD RAILROAD COMPANY and others.

(District of Minnesota. ——, 1880.)

1. BRIDGE — NAVIGABLE RIVER — NUISANCE — INJUNCTION. — A preliminary injunction to restrain the erection of a bridge across a navigable river will not be allowed where it is shown that such bridge will not be an obstruction necessarily amounting to a nuisance.

Application of plaintiff for preliminary injunction to restrain defendants from erecting a draw bridge across the Red River of the North.

Gilman & Clough, for the application.

Bigelow, Flandrau & Clark, Geo. B. Young and *R. B. Galusha*, against.

NELSON, *District Judge.*— It is not clear to my mind that the complainant can maintain this suit in which an injunction is prayed. The Northern Pacific Railroad Company was chartered to construct and operate a railroad from Lake Superior to the Pacific ocean. The authority to build a road between these two points, thus giving almost a continuous route of transportation east and west across the continent, gave the chief value to its franchises. The road was not to be built for the purpose of securing the trade upon the navigable waters it crossed on its route, although the navigation of these waters might increase its revenues, and I am not fully satisfied that this navigation is so important that the

value of the railroad would be seriously injured by anything that obstructed it. But, concede that an obstruction to the navigation to the Red River of the North, a navigable river which it crosses, would seriously impair the value of the road, and affect injuriously the private interests of the company, so that it could enjoin such obstruction, the question is then presented, will the contemplated bridge to be erected by the said defendants be an obstruction and a nuisance?

If it will be a nuisance to the company, no legislative authority for its construction by the state of Minnesota would justify its erection, and no authority from the legislature of Dakota territory could prevent its abatement as a nuisance, unless sanctioned, perhaps, by the congress of the United States. It is doubtful whether the bridge is authorized to be built by the legislature of the territory of Dakota, but this point it will only be proper, in my opinion, to consider when an objection to its construction is made by the United States. The state of Minnesota, if it objects, can be heard in its own courts. An examination of the affidavits filed by the defendants shows that the bridge will not be an obstruction necessarily amounting to a nuisance, and following the principle adopted by the United States supreme court in the *Wheeling Bridge Case*, as I understand it, I shall not interfere with the erection of the bridge proposed by the defendants at this time. They may take the responsibility of its construction, and if it should be settled after it is built that it is a nuisance, and injuriously affects the complainant's private interest, it will be abated.

Motion for injunction denied.

TEMPLE and others *v.* SMITH and others.

(District of Nebraska. November, 1880.)

1. REMOVAL — ASSIGNMENT OF CLAIMS. — A defendant cannot acquire the right to have his cause removed to the federal courts by the purchase of the interests of his co-defendants.
2. SAME — CONTROVERSY — SEVERAL CREDITORS — CONTEMPORANEOUS ATTACHMENTS. — Five several attachments were sued out on five distinct claims and were all levied at the same time upon a certain stock of goods. *Held*, that the controversy as to the ownership of the stock of goods was a single controversy between the plaintiffs on one side and all the attachment creditors upon the other side.

Motion to remand.

MCCRARY, *Circuit Judge (orally).* — We have considered the motion to remand. This was a suit brought in the state court — a replevin against the sheriff of Saline county to recover possession of a stock of goods which the sheriff held under five several writs of attachment. The sheriff appeared in the state court and moved to substitute the judgment creditors as the real parties in interest, and that motion was sustained. Two of these judgment creditors are citizens of this state; one of them is a citizen of Iowa. After the substitution of the judgment creditors as defendants, the Iowa firm appeared in the state court and moved to be substituted as sole defendant, alleging that they had become the purchasers of the claims. There is nothing in the record to show that this motion was acted upon by the state court, but immediately upon its being filed the non-resident defendants filed a petition to remove the cause to this court, alleging that they had become purchasers and assignees of the other defendants. The motion is now made to remand by the plaintiffs.

I have already decided that an assignee who could not originally sue in this court cannot remove the cause from the state court. That disposes of this case, except so far as the claims of the Iowa parties, which they held originally, are concerned. They owned one of the five claims upon which

this attachment was sued out, independently,—a claim which was in controversy in this case. It is now insisted, under the second section of the act of congress of March 3, 1875, that if the whole case cannot be removed, so much as related to the claim of these non-resident parties may be removed. The original controversy here is between the Iowa attaching creditors and these plaintiffs, but it is not wholly between them. The controversy is as to the ownership of this stock of goods, and that is a controversy between the plaintiffs on one side and all the attachment creditors on the other side. It cannot be said to be a controversy between the plaintiffs and any one of the creditors. It follows that, if this cause should be removed, there might be conflicting judgments upon the same subject-matter.

There is another difficulty. The attachments were all levied at the same time, and they are to be paid out of the proceeds of the property. How can this court confer with or act with any other court in making any *pro rata* disposition of this fund? I do not see how it would be possible to get along in that way. Even if both courts should sustain the attachment, we could not inquire what the state court had done.

I do not think the controversy is one which can be fully determined between the Iowa parties and other claimants, and the motion to remand is sustained.

THE PACIFIC RAILROAD (OF MISSOURI) *v.* THE MISSOURI PACIFIC RAILWAY COMPANY, C. K. GARRISON *et al.*

(Eastern District of Missouri. April, 1881.)

1. BILL OF REVIEW.—A bill of review upon newly discovered facts and evidence can only be filed within the period for taking an appeal and with the leave of the court.
2. ORIGINAL BILL TO IMPEACH A DECREE FOR FRAUD.—Courts of equity have undoubted jurisdiction to entertain bills to set aside judgments at law or decrees in chancery on the ground of fraud. The rules by which the

sufficiency of such bills is to be determined are the same, whether the purpose be to set aside a judgment at law or a decree in chancery.

3. SAME — DILIGENCE.— No relief will be granted if the complainant had knowledge of the facts constituting the fraud, and in the exercise of due diligence might have made them known to the court pending the original suit.
4. SAME — SAME.— Nor will relief be granted if the complainant might by the use of due diligence have ascertained the facts and pleaded them in the original suit.
5. SAME — ESSENTIAL ALLEGATION.— The bill must allege that the facts constituting the fraud were unknown to the complainant pending the original suit, and could not by reasonable diligence have been ascertained by him and brought to the notice of the court.
6. CORPORATION — STOCKHOLDERS — DUTY OF LATTER TO TAKE CARE OF THEIR INTERESTS.— Where the stockholders in a corporation are dissatisfied with the action of the officers of the corporation in the conduct of a suit in equity, upon the ground that such officers are acting in bad faith and not protecting the interests of the stockholders, it is not enough for such stockholders to request the board of directors to remove such officers and appoint others in their places who will attend to the interests of the corporation. It is their duty, especially if such request is disregarded, to apply to the court for leave to intervene and protect their interests, and failing to do so, they are bound by the decree.
7. STOCKHOLDERS — LACHES.— Where the stockholders in a railway corporation, having knowledge that their officers were not defending in good faith a foreclosure suit pending against the corporation, and having an opportunity to move in the original suit before decree or to file a bill immediately upon the rendition of the decree, failed to do either for a period of four years, during which the decree had been fully executed, the property sold and the sale confirmed, and the property conveyed by the purchaser to a new corporation which had issued new stock and executed negotiable bonds for large sums secured by mortgage on the property, and sold them in the market: *Held*, that such stockholders were guilty of laches.

Bill in equity to set aside a decree of this court for fraud.

The facts are sufficiently stated in the opinion.

The respondents demurred to the bill.

Glover & Shepley, for complainant.

Melville C. Day, *J. O. Broadhead* and *Thos. J. Portis*, for respondents.

McCrary, *Circuit Judge.*—This is either an original bill to impeach a decree of this court for fraud, or a bill of review upon newly discovered facts and evidence. We think it is the former; and as that is in accordance with the claim of complainant's counsel, we will so regard it, remarking, however, that if it be the latter it is clearly bad, because filed too late, and also because filed without the leave of the court. *Ricker* v. *Powell*, 100 U. S. 109; Story's Eq. Pl. secs. 412–414.

Considered as an original bill, is it sufficient? Courts of equity have undoubted jurisdiction to entertain bills to set aside judgments at law or decrees in chancery on the ground of fraud. The rules by which the sufficiency of such bills are to be determined are the same, whether the purpose be to set aside a judgment at law or a decree in chancery. *United States* v. *Throckmorton*, 98 U. S. 61.

Among these rules are the following:

1. No relief will be granted if the complainant had knowledge of the facts constituting the fraud, and in the exercise of due diligence might have made them known to the court pending the original suit. *Foster et al.* v. *Wood*, 6 Johns. Ch. 86; *Lansing* v. *Eddy*, 1 Johns. Ch. 49; *Kibbe* v. *Benson*, 17 Wall. 627.

2. Nor will relief be granted if the complainant might by the use of due diligence have ascertained the facts and pleaded them in the original suit. *United States* v. *Throckmorton*, *supra.*

Applying these rules to the present case, we are brought at once to the inquiry whether the present complainant, a corporate body, which was a defendant in the suit of Ketchum, had notice of the fraud now alleged, or might have learned the facts by proper diligence, and might have pleaded them in that suit. We find no allegation in the bill charging that the complainant was ignorant of the facts pending the original suit, much less that it was unable after due diligence to ascertain and plead them. In this respect the bill is insufficient. There is a want of these material affirmative allegations. But the

demurrer goes further, and raises the question whether the bill and exhibits do not show affirmatively that the present complainant, through its stockholders, had notice of the foreclosure suit; knowledge of the defense now insisted upon against the third mortgage bonds, and ample opportunity to make that defense.

It is, we think, very clear that in considering the question of notice, no distinction can be made between the corporation and its officers and stockholders. We cannot separate them, and say the officers and stockholders knew of the fraud, but the corporation did not. If, therefore, the stockholders were advised of the foreclosure suit, and of the facts now charged as constituting fraud in the execution of the bonds and mortgages sued on therein, and had an opportunity to intervene and defend, and did not do so, the corporation is concluded by their laches.

That the stockholders, as a body, were advised of the foreclosure suit, and took action looking to its defense, and that they did not rely upon the officers of the corporation, but distrusted and antagonized them, is clear from the allegations of the forty-fifth count of the bill, by which it is charged that the stockholders, in writing, requested the directors to resign that others might be appointed in their place who would properly attend to the duties of their office; also that the stockholders requested said directors to employ counsel other than James Baker to defend the suit of Ketchum.

It further appears that at a meeting of stockholders held March 27, 1876, at St. Louis, several months before the rendition of the decree of foreclosure, a resolution was adopted requesting the directors to employ counsel to aid in the defense of the foreclosure suit. This meeting was held while the suit was pending and in the city where the court was sitting. See record *Ketchum Case*, page 50. It was not enough for the stockholders to content themselves with the passage of this resolution, especially as the bill avers that it was disregarded. They were bound to go forward, with

due diligence, in the assertion of their rights, which they knew were imperiled; and we see enough in the record to satisfy us that they would have done so but for the fact that they, or their managing committee to whom they intrusted their interests, afterwards became satisfied with, and assented to, the decree.

It is very apparent that the stockholders were dissatisfied with the action of the directors and attorney of the company in the defense of the foreclosure suit. They were therefore put upon inquiry and bound to do whatever it was in their power to do to protect their interests. Any individual stockholder was at liberty to apply to the court for leave to intervene and defend. The stockholders were parties in interest, and upon representing that fact to the court and showing that the officers were not defending in good faith, they would without doubt have been allowed to defend. That the court in that case recognized the propriety of this, is clear from the fact that several stockholders asked and readily obtained leave to appear and defend.

It may be true, as a general proposition, that the stockholders of a corporation are not bound to intervene in a suit against the corporation for the protection of their rights. If the officers fraudulently consent to judgment or decree, the stockholders may, perhaps, afterwards file a bill to set it aside, provided they do so within a reasonable time after the discovery of the fraud. But we do not think it can be maintained that the stockholders of a corporation, who have notice that the officers are not faithfully defending a suit, can neglect to intervene, or to take any steps in the way of endeavoring to do so; permit final judgment or decree to be entered, and sale to take place, and then, after years have elapsed, be permitted to attack the validity of the proceedings.

If this were not a rule applicable generally to all corporations, it would still, we think, apply to this particular corporation, for the reason that its charter vests in the stockholders, in annual meeting assembled, power to do and perform

all corporate acts authorized by the charter. Laws of Mo., 1851, p. 268.

We have already seen that the stockholders were aware of the suit; that their attention was directed to it; that they distrusted the officers of the corporation and took steps looking to the assertion of their rights. It is also apparent from the record of the proceedings in the *Ketchum Case* that they knew the facts now set up by way of defense. Akers, one of their number, and also the county of St. Louis, on behalf of themselves and such other stockholders as might join therein, appeared in said suit, and by leave of court answered and filed cross-bills, setting forth in substance the principal facts now relied upon. Record *Ketchum Suit*, p. 24.

It was therefore correctly stated by the judges of this court in their return to the alternative writ of *mandamus* in *Ex parte Cutting*, that "said Cowdrey and all other stockholders who might join with him were in court during all proceedings of the term when the decree of foreclosure and sale was entered, and had the fullest opportunity to intervene by joining in the answers and cross-bills filed by Akers and said St. Louis county, and otherwise."

This, upon the ground that the stockholders were bound to take notice of the proceedings of the stockholders' meetings, and were also bound by the action of their committee appointed to represent them in this litigation, as well as upon the further ground that some of their number actually appeared and were admitted as parties to the suit. We are therefore constrained to hold that the stockholders were concluded by the decree and sale, and that whatever concludes the stockholders individually and collectively concludes the corporation as well. Another consideration has great weight with us. The stockholders of the Pacific Railroad, having knowledge of all the facts, and an opportunity to move in the original suit before decree, or to file a bill immediately upon the rendition of the decree, failed to do either during a period of four years. In the meantime the decree had been fully

executed; the property had been sold and the sale had been confirmed; the purchaser at the sale had conveyed to a new corporation, which had issued new stock, and executed negotiable bonds for large sums secured by mortgage upon the property. The stock and bonds of the new company have gone into the market. Whether it is all held by innocent purchasers, we are, of course, in the absence of proof, unable to say, but the facts and circumstances to which we have adverted certainly furnish strong reasons for holding that the stockholders and the corporation have been guilty of laches. The case of *Wetmore* v. *The St. Paul, etc. Railroad Company*, 1 McCrary C. C. Rep. 466, was a bill by stockholders to set aside a sale and the decree of foreclosure upon facts somewhat similar to those presented by the present bill.

Mr. Justice MILLER in that case said: "The purpose of the petition is no less than to set aside the sale of a railroad, which is perhaps worth $20,000,000, or more; a road which has been reorganized since the purchase, with a new set of directors, a new set of stockholders, very largely, and above all, a new set of bondholders. The road was purchased under a decree of this court, the purchase was confirmed, and a new company organized, which has been in possession of the road over a year, and has issued, as I say, some $10,000,000 or $15,000,000 of new bonds, held all over the world; and now original bondholders in the old company, representing $1,500,000, come and ask that all these proceedings be set aside, and that we proceed *de novo* to sell the road."

And again: "The sale was had. A part of the original bondholders were, under a special organization, according to the laws of Minnesota, purchasers. That did not settle the controversy or the rights of the parties absolutely. The master who made that sale was required to report it into court. He did report it, and the sale was confirmed.

"Now, that sale being confirmed, a deed made by the master, property turned over and delivered to the purchasers, those purchasers having reorganized under another corporate name,

doubtless a great deal of the stock that they held passed into the hands of other men — certainly the bonds that they issued upon the strength of that new organization, to the extent of $8,000,000, having passed into the hands of other men — these parties now, for the first time, come into this court and ask that they be permitted to upset all the transactions, to do that which they did not seek in the five years of litigation, namely, to be made parties to this suit, and then to be treated in the double aspect of persons who are parties to the suit and having all the rights of parties from the beginning, and also in the aspect of persons who were not parties to the suit, and whose rights have not been foreclosed.

"No authority is shown, no precedent is shown, and I do not believe any can be shown, for such a proceeding. It is so anomalous, so unusual, so much out of the way, that I think it requires express authority in the way of precedent or statute to show that such a thing as that can be done."

Numerous other questions, and some of them important, and perhaps doubtful questions, have been discussed at the bar, but the conclusion reached renders their decision unnecessary. Among them is the important question, whether, regarding this as an original proceeding to set aside a decree of this court for fraud, the court has jurisdiction irrespective of the citizenship of the parties.

Another is the question whether such a bill, like a bill of review on the ground of newly discovered facts, must be filed within the period for taking an appeal. The affirmative of the latter proposition seems to have been held in Massachusetts and elsewhere. *Evans* v. *Bacon*, 99 Mass. 213.

The demurrer to the bill is sustained.

TREAT, *District Judge*, concurs.

Ross *v.* The Chicago, Milwaukee & St. Paul Railway Company.

(District of Minnesota. June, 1881.)

1. Negligence — Fellow Servants. — If a corporation employs several agents as fellow servants in the same common employment, and one of those servants is injured by the negligence of another, the corporation (at common law) is not liable unless it be that the servant who is guilty of the negligence was employed by the company with knowledge that he was incompetent or negligent, or was continued in service by the company after notice of the fact that he was incompetent or negligent.
2. Same — Common Service. — If the company sees fit to place one of its employees under the control and direction of another, then the two are not fellow servants engaged in the same common employment within the meaning of the rule above stated.
3. Same — Same. — Where the rules of the company required that "conductors must in all cases, while running by telegraph or special orders, show the same to the engineer of their train before leaving stations where orders are received," and that "the engineer must read and understand the order before leaving the station," *held*, that the engineer was in an important sense subordinate to the conductor, and they were not fellow servants.
4. Same — Same. — Under such a rule the conductor was the superior of the engineer in respect to the duty of delivering or showing the running orders to the engineer, and when such conductor failed to show such orders to the engineer, and an accident happened by which the engineer was injured, *held*, that the company was liable.
5. Railroad Company — Duty to Employ Competent Persons. — When a railroad company takes a servant into its employ it becomes obligated to use proper diligence in the employment of fellow servants of ordinary fitness and competency, and not to continue an incompetent or unfit person in its service after notice.
6. Same — Duty of Giving Notice. — If one servant of a railroad company becomes aware of the negligence or incompetency of a fellow servant, it is his duty to give notice to the company.
7. Same — Duty of Company upon Receiving Notice. — Upon receiving notice of the incompetency or negligence of an employee, the railroad company continues him in service at its own risk, notwithstanding the fact that it may have made inquiry or had an investigation and decided that such servant was not negligent or incompetent. It is bound by the fact, whatever it may be.
8. Same — Remaining in Service after Notice. — Where an employee knows that a fellow servant is negligent or incompetent and gives notice thereof to the company, he is not bound, at once, to leave the service of the company. He may remain a reasonable time with the expectation that the company will do its duty.

This was an action for damages received by the plaintiff, who was an engineer of a freight train. The injury was the result of a collision between the freight train and a gravel train. One McClintock was the conductor of the freight train, and had received orders to stop at a certain station and wait for the gravel train to pass, but had failed to show said orders to the engineer (plaintiff) as he was bound by the rules of the company to do. This negligence of the conductor caused the accident. It was alleged that the conductor was a negligent and unfit person, and that the company had notice of this fact and continued him in service.

The principal defense was, that the accident was caused by the negligence of a fellow servant in the same common employment with the plaintiff.

C. K. Davis, for plaintiff.

Lochaan, McNair & Gilfillan, for defendant.

McCrary, *Circuit Judge*, charged the jury orally as follows:

Gentlemen of the Jury—It is your exclusive province to consider and decide all the disputed questions of fact which arise in this case; it is the duty of the court, however, to instruct you concerning the questions of law which arise, and which ought to be understood by the jury in order that they may properly apply the facts to the law.

The plaintiff sues the defendant to recover damages for personal injuries which he has received, as he alleges, through the negligence of the defendant. The controlling question in the case, then, is one of negligence. The fundamental inquiry is, whether the plaintiff has received his injury because of the negligence of the defendant and without any negligence of his own.

Negligence is the want of ordinary care and prudence—such ordinary care and prudence as a man of common intelligence would exercise under the circumstances.

The defendant here is a corporation, and in the nature of

things a corporation must always act by and through its agents and servants. A corporation is an artificial being — in law it is a person; but it is not tangible, and has no visible existence that we can see and handle. It acts by its officers and agents. The question here is, whether this corporation has been guilty of negligence by which the plaintiff has been injured.

The general rule is that a corporation is bound by the acts of its agents and servants, and is liable for their negligence in the performance of the duties which it imposes upon them. That is the general rule, but to that general rule there is an exception, which is as follows: If a corporation employs several agents as fellow servants in the same common employment, and one of those servants is injured by the neglect or wrong of another, the corporation is not liable unless it be that the servant who is guilty of the wrong or the negligence was employed by the company with knowledge that he was incompetent or negligent, or was continued in service by the company after notice of the fact that he was incompetent or negligent.

This brings us, gentlemen, to the first question in dispute in this case. It is alleged by the defendant here, as one of the grounds of defense, that the plaintiff was injured by the negligence of a fellow servant, employed in the same common service with himself, and this makes it necessary for us to inquire what is meant in law by a fellow servant, employed in the same common employment. It is very clear, I think, that if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow servants engaged in the same common employment within the meaning of the rule of law of which I am speaking. It is conceded here that this plaintiff was an engineer upon a freight train at the time of the accident; that one McClintock was the conductor upon that train; and it is not seriously disputed that the accident was the result of the negligence of the conductor in failing to show to the engineer the order which he had received to stop the train at a station which

I believe is called East Minneapolis. In order to determine this question it will be necessary to refer to the general order of the company, which has an important bearing upon it, regulating the delivery of orders concerning the running of trains. It is averred in the petition, and is admitted by the answer, that at the time of this accident there was a general order in force, issued by this company, for the guidance of its employees in cases of this sort, which is as follows: "Conductors must, in all cases, while running by telegraph or special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station." By this general order, gentlemen, as I understand and construe it, the company made the engineer, in an important sense, subordinate to the conductor. By it the conductor was made the medium through whom and by whom the company communicated its orders touching the running of trains to the engineer. The company saw fit to make him their agent and representative for this purpose, and to require plaintiff to receive his orders in this way. I am of the opinion that in respect to the duty of delivering or showing the running orders to the engineer the conductor was the superior of the engineer; that he stood in the place and stead of the company, and was, for that purpose, a vice-principal. It follows from this that if the accident complained of was the result of the negligence of the conductor in failing to deliver the running orders to the plaintiff on the night of the accident, the plaintiff must recover unless his own negligence caused or contributed to the injury. And upon that subject — of contributory negligence on the part of the plaintiff — I will speak presently.

If you find that the accident was caused by the failure of the conductor to deliver the order concerning the running of the train that night to the plaintiff, who was the engineer, and if you also find that plaintiff was injured, and that he did not contribute to his injury by any negligence of his own, then

the law is that the defendant is liable. Because, I hold that, under the order to which I have called your attention, the relation of superior and inferior was created by the company as between these two servants in the particular matter of the operation of its trains, and they were not, within the meaning of the law, fellow servants engaged in the same common employment.

But the plaintiff claims to recover upon another ground, and it will be your duty to pass upon that also. He claims that he is entitled to recover upon the ground that McClintock, the conductor, was a negligent and unfit person to be entrusted with the duties of a conductor; and that the defendant company had sufficient notice of that fact before the accident and continued him in its service. This is denied by the defendant, and the issue thus joined being one purely of fact, is for you to determine from all of the evidence before you.

When the plaintiff entered the service of the defendant he voluntarily assumed all the usual and ordinary risks belonging to the occupation in which he was about to engage; but the company also became obligated to use proper diligence in furnishing him with reasonably suitable and proper machinery with which to work; and, also, in the employment of fellow servants who should have ordinary fitness and competency for the performance of their duties. In other words, it was the duty of the company not to subject plaintiff to any extraordinary or unusual danger by employing, knowingly, other servants to operate the trains with him who were negligent or incompetent. And it was also the duty of the company, if they ignorantly or without notice employed an incompetent or improper servant, and afterwards became advised or had notice of the fact of his character for incompetency or negligence, it was the duty of the company, under those circumstances, to discharge him. And if they continued such persons in their service as conductor after notice, they became liable for any damage that the plaintiff may have sustained through the negligence of the conductor.

It was the duty of the plaintiff, however, when he became aware of the negligence of this conductor, to give notice to the company. If he knew it himself, and took no steps to communicate the fact to the company, gave them no warning about it, and they went on in ignorance of it and continued him in their service, he cannot complain. Whether he gave notice to the company of the negligence of this conductor is a question of fact for you to decide upon the evidence. If it be true that he communicated the fact by letter to the master mechanic, and the master mechanic laid it before the assistant superintendent, who acted upon it so far as to institute an investigation concerning it, that was sufficient notice to the company.

I instruct you further, that the company cannot protect itself from the consequences of the negligence of the conductor after notice of his negligent character, by showing that they believed him to be competent and diligent, nor by showing that they instituted an investigation which resulted in his acquittal upon the charges of incompetency and negligence which were made against him. When the company was notified by another employee that this conductor was a negligent and incompetent official, it continued him at its own risk. They were bound, in other words, by the fact, whatever the fact might be. They were put upon inquiry, and as to the rights of their employees they cannot shield themselves upon the ground that they did not believe in the truth of the charges that were made against him. So that upon this branch of the case, gentlemen, you are simply to inquire, first, whether McClintock was in fact a negligent and unfit person to be entrusted with the duties of the conductor of the train; and second, whether the company, under the rules that I have already indicated to you, had notice of the fact of his unfitness or his negligence before the time of this accident, and continued him in their service notwithstanding such notice. Upon this branch of the case I shall ask you to find specially by answering an interrogatory which I have prepared and will submit

to you; I will ask you to say specially upon this branch of the case whether McClintock was a negligent or unfit person, and whether the company had notice. It may be necessary, in view of possible further proceedings in this case, that we should have your finding upon that specific fact.

But it is insisted by the defendant that even though the company may be guilty of negligence, either by the act of the conductor in failing to deliver these running orders on the night in question, or by reason of the fact that the conductor was known to be negligent, and their having continued him in service — in other words, it is insisted that, although you may find for the plaintiff upon the question of the defendant's negligence, that yet the plaintiff cannot recover because he was also negligent, and his negligence contributed to the accident. Upon this subject, gentlemen, you have all the facts before you, and it is not expedient, even if it were proper, for me to comment upon the testimony. You will look into the testimony as it has been delivered to you, showing the conduct of the plaintiff on the night of the accident — the manner in which he ran the train. You will consider the question whether there is any proof tending to show, or sufficient to show, that he knew or had any reason to believe that the gravel train was on the track over which he was called upon to pass; whether there is anything to show that he was bound to stop at the station and wait for the gravel train without order, because it is conceded that the orders were not delivered to him by the conductor.

There is another branch of the case upon which it is earnestly contended by the defendant that the plaintiff has been shown to have been guilty of contributory negligence. It is said that he had notice of the negligence of this conductor, McClintock; that for some time before this accident he confessedly knew that McClintock was a negligent and improper person to hold that position, and that, knowing that fact, he was negligent in continuing in the service of the company.

The law upon this subject, gentlemen, is that if one employee of a railroad company discovers that a co-employee of his is

negligent or unskillful, it is his duty to give notice to the company, but it is not necessary that he should at once quit the service of the company. After having given notice, he may continue in the service of the company for a reasonable time, in the expectation that the company will take proper action in the premises and discharge the unworthy and incompetent person. And if, within this reasonable time after notice has been given, and before the objectionable person has been discharged, the party is injured by the negligence of the person complained of, the company is liable. And I say to you that two or three or four weeks would not, in my judgment, be considered an unreasonable time in which, under all the circumstances, a party might delay for the action of the company, upon such complaint having been made.

I think of nothing further, gentlemen, except to call your attention to the question of damages, in the event that you find a verdict for the plaintiff. You will take into consideration upon that subject, if your verdict is for the plaintiff, all the facts and circumstances which have been shown to you in evidence. You will consider carefully the medical testimony and the testimony of the plaintiff, and all the testimony that there is before you touching the nature and the extent of the plaintiff's injuries and the question as to their probable duration — as to whether they are temporary or permanent — their effect upon his ability to earn a living, to pursue his ordinary avocation since the accident and up to this time, and their probable effect upon his health and strength and his ability to pursue his avocation or to earn a living in the future. You will consider the pain and suffering which have been the result of the accident and injury and what is probable in the future. You will take into account his expenses for physician and medicines, if that has been established before you to your satisfaction; and upon all the facts in the case you will determine, as best you can, what would be a reasonable and fair compensation for the injuries of the plaintiff, and you will allow him that, and will not allow him what would be considered an unreasonable or

excessive amount. It is for you to say, under the circumstances, what would be fair and just. Of course it is very difficult to estimate things of this kind. The events of the future cannot be foretold with certainty. All you can do, gentlemen, is to take all the facts that appear before you in this case and reach the best result that you can upon that branch of it, in the event, of course, that you find upon the other questions that I have called to your attention in favor of the plaintiff.

The jury found a verdict for plaintiff for $10,500.

NOTE. —1. The servant assumes the ordinary risks of his employment, but if through negligence, fraud or malice the master subjects him to risks greater than those which fairly and properly belong to his employment, and he is injured in consequence, the master is liable. And it is negligence on the part of the master if he, either personally or through his vice principal, interferes, and either does or commands the doing of the act which caused the injury. Thompson on Negligence, vol. 2, p. 970 *et seq.*

2. The authorities are not harmonious upon the question, who are to be regarded as fellow servants engaged in a common employment within the meaning of the rule discussed in the foregoing charge. The general rule, according to the weight of authority, would seem to be, that all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants who take the risk of each others' negligence. Thompson on Neg. vol. 2, p. 1026, § 31, and cases cited. There are, however, cases somewhat exceptional in their nature, of which the principal case is an illustration. These exceptional cases grow out of the reason which is generally given for the rule itself. That reason is, that it is desirable, upon considerations of public policy, to make it the interest of each one of such employees to look after and encourage carefulness and fidelity in all the rest. This reason cannot apply to a case where the relation of superior and subordinate exists, because the situation of the subordinate allows him no influence over the superior. *Cooper* v. *Mullins*, 30 Ga. 150; *Louisville R. Co.* v. *Cavens*, 9 Bush, 559; *Nashville, etc. R. Co.* v. *Jones*, 9 Heisk. 27; *Toledo, etc. R. Co.* v. *O'Connor*, 77 Ill. 391.

3. The rule laid down in the charge can probably be well supported as within the general rule itself, because the engineer and conductor were not at the time of the accident working "under the same control." The engineer was under the control of the conductor so far as the receipt of orders by the former was concerned, and it would be a gross misapplication of the rule to deny him a remedy for injuries resulting from the failure of the conductor to

give him the orders. Having entrusted to the conductor the duty of giving orders to the engineer concerning the running of trains, the company made the conductor a vice-principal, and placed the engineer not only in a position of subordination, but completely within the power and at the mercy of the conductor. The general rule that the superior and inferior are not fellow servants in the same common employment is recognized in the following cases: *Little Miami R. Co.* v. *Stevens*, 20 Ohio, 415; *Cleveland, etc. R. Co.* v. *Keary*, 3 Ohio St. 201; *Berea Stone Co.* v. *Kraft*, 31 Ohio St. 287, 292; *Louisville, etc. R. Co.* v. *Collins*, 2 Duv. 114; *Whaalan* v. *R. Co.* 8 Ohio St. 249; *Railroad Co.* v. *Fort*, 17 Wall. 553. And see also *Hough* v. *Railway Co.* 100 U. S. 213, where it is laid down that an exception to the general rule exempting the common master from liability to a servant for injuries caused by the negligence of a fellow servant, arises from the obligation of the master not to expose the servants to perils or hazards against which they may be guarded by proper diligence. *Grizzle* v. *Frost*, 3 Fost. & Fin. 622 (Charge by Lord Cockburn, C. J.); *Mann* v. *Oriental Print Works*, 11 R. I. 152; *Cooper* v. *R. Co.* 44 Iowa, 134; *Cook* v. *R. Co.* 63 Mo. 397; *Whalen* v. *Centenary Church*, 62 Mo. 226; *Louisville, etc. R. Co.* v. *Bowler*, 9 Heisk. 866; *Nashville, etc. R. Co.* v. *Jones*, 9 Heisk. 27; *Chicago, etc. R. Co.* v. *Bayfield*, 37 Mich. 205; *Booth* v. *Boston, etc. R. Co.* 73 N. Y. 38; 67 N. Y. 598. See also *Flike* v. *Boston, etc. R. Co.* 53 N. Y. 550.

4. A servant does not, by merely continuing in the service after knowledge of the unfitness or negligence of a fellow servant, assume the risk of injury from the negligence of such fellow servant. He assumes the risk only in case, with such knowledge, he continues in the service without objection or protest, or without being induced by his master to believe that a change will be made. *Krog* v. *Chicago, etc. R. Co.* 32 Iowa, 357; *Greenleaf* v. *Dubuque, etc. R. Co.* 33 Iowa, 52; *Muldowney* v. *Illinois, etc. R. Co.* 40 Iowa, 341; *Lumley* v. *Caswell*, 47 Iowa, 159; *Crutchfield* v. *Richmond, etc. R. Co.* 78 N. C. 300.

Irwin *v.* Meyrose.

(Eastern District of Missouri. March, 1881.)

1. Bill of Review — Failure of Complainant to Appear in Original Suit. — Where, upon the trial of a proceeding in equity for the infringement of a patent, the plaintiffs fail to appear, and the court examines the pleadings, exhibits and proofs, and orders a decree for the defendant, and afterwards the plaintiffs file a bill for review disclosing no error upon the record and setting up no new matter, a demurrer to such a bill for review will be sustained.

2. SAME — FAILURE TO TAKE TESTIMONY UNDER EQUITY BILL.— When a complainant in a bill in equity fails to take testimony within the three months' time prescribed by the 69th rule, and fails to obtain leave of court for further time to do so, the court will proceed to hear and determine the case as made upon the pleadings, proceedings and exhibits, and take such action with regard to the issues presented as the circumstances of the case may require.

Noble & Orrick and *Coburn & Thacher*, solicitors for plaintiffs.

Edward J. O'Brien, solicitor for defendants.

TREAT, *District Judge.*— In September, 1879, a bill in equity was filed by plaintiffs against the defendants for alleged infringements of patents. An answer with notice was filed in due time as to anticipations, etc. (under United States Rev. Stat. sec. 4920), looking to the impeachment of the validity of said patents, and a general replication was duly entered. A few days before the time limited for taking testimony, the defendants' solicitor moved for the appointment of an examiner to take testimony in their behalf. As the plaintiffs had taken no testimony or given notice therefor, the court, to prevent unnecessary costs, withheld the order sought by defendants' solicitor, because, so far as disclosed, the plaintiffs had either abandoned their case or were willing to stand on the pleadings and exhibits. When the case was subsequently reached in due course on call of the "equity docket," the defendants answering the call, the court *mero motu* set the case down for hearing at a day named. There was no order made upon defendants' solicitor, nor suggestion as to notice upon plaintiffs and their solicitors; hence, the allegations in the bill of review now before the court, so far as they are based on the conduct of the defendants' solicitor in that respect, are entirely groundless; yet, on demurrer, they must be taken as true. The court, desiring to pursue its business in an orderly manner and with proper dispatch, did, according to its practice, call the equity docket, and take such action with regard to each case called as

the circumstances required. The original case, having been set down for hearing, was not reached in due course for some days thereafter. No one appeared for plaintiffs, but defendants were duly represented. The court examined the pleadings, exhibits and proofs, and ordered a decree for defendants. Whatever was done was not through lack of courtesy or otherwise on the part of defendants' solicitor, but on the positive requirement of the court that the case should proceed. This action of the court was based on the necessity of its business, viz.: that some one should respond to the call of the case. The defendants responded, and the court proceeded accordingly, the time for taking testimony having expired, and no extension asked.

A bill of review has been filed to which a demurrer is interposed. In the case of *Whiting* v. *Bank of the United States*, 13 Pet. 6, it is said: "As the original decree, which it seeks to review, was properly, according to our course of practice, to be deemed recorded and enrolled as of the term in which the final decree was passed, it is certainly a bill of review in contradistinction to an original bill in the nature of a bill of review; which latter bill brings forward the interests affected by the decree, other than those which are founded in privity of representation. * * * It has also been suggested at the bar, that no bill lies for errors of law, except where such errors are apparent on the face of the decree of the court. That is true in the sense in which the language is used in the English practice. In England the decree always recites the substance of the bill, answer and pleadings, and also the facts on which the court founds its decree. But in America, the decree does not ordinarily recite either the bill or answer or pleadings, and generally not the facts on which the decree is founded. But with us the bill, answer and other pleadings, together with the decree, constitute what is properly considered as the record. And, therefore, in truth, the rule in each country is precisely the same in legal effect, although expressed in different language, namely, that the bill of review must be

founded on some error apparent upon the bill, answer and other pleadings and decree; and that you are not at liberty to go into the evidence at large in order to establish an objection to the decree founded on the supposed mistake of the court, in its own deductions from the evidence."

In the case of *Kennedy* v. *Georgia State Bank*, 8 How. 586, the United States supreme court again referred to the doctrine governing bills of review, in this language: "This bill has been considered by some of the defendants' counsel as a bill of review. But is has neither the form nor the substance of such a bill. Since the ordinances of Lord Bacon, a bill of review can only be brought for 'error in law appearing in the body of the decree or record,' without further examination of matters of fact, or some new matter of fact discovered, which was not known, and could not possibly have been used at the time of the decree." The same question underwent review in *Putnam* v. *Day*, 22 Wall. 60. "We think the rule to be well established, and a wholesome one, that * * the proofs cannot be looked into on a bill of review. This was so expressly held in *Whiting* v. *Bank of the United States*. It is true that in our practice the final decree does not contain a summary of the facts as it did in the English practice, which summary was examinable on a bill of review; but, to countervail this absence of statement in the decree, we have adopted the practice of looking back of the decree into the whole record of the pleadings and the proceedings, including orders, master's report, etc., together constituting what is generally regarded as the record in the cause, and necessary to be examined in order to a proper understanding of the decree itself. This makes a record similar to that of a common law action, the decree being the judgment of the law upon the allegations of the parties, and the conclusion which the court deduces from the proofs. But the conclusions of fact deduced from the proofs are not spread upon the record *in extenso*, unless through the medium of a report made by a master or commissioner. The eighty-sixth rule in equity, adopted by this court, has abolished the

recital of the pleadings and proceedings in the decree, and has prescribed the form in which it shall be couched, as follows: This cause came on to be heard at this term, and was argued by counsel; and thereupon, in consideration thereof, it was ordered, adjudged and decreed as follows, viz.: [Here inserting the decree or order.] The decree, it is true, may proceed to state conclusions of fact as well as of law, and often does so, for the purpose of rendering the judgment of the court more clear and specific. The record thus made up constitutes the basis of examination on a bill of review, but it never contains the proofs adduced in the cause." In the case of *Buffington* v. *Harvey* (5 Otto, 99), the same subject was again presented to the United States supreme court on a demurrer to a bill of review. After pointing out the rules as to motions for rehearing, etc., and giving clearly the views of the court on that and kindred questions of practice, the court says: "To avoid misapprehension in what we have said with regard to the proceedings on a bill of review, it will be observed that, in this case, the bill is a pure bill of review, containing no new matter, such as allegation of newly discovered evidence, or anything else of an original character, admissible in such a bill. What we have said is specially applicable to the case before us. Bills containing new matter of course are in the nature of original bills, so far as such new matter is concerned, and admit of an answer and a replication, and proceedings appertaining to an issue of fact; but only as it relates to the truth and sufficiency of such new matter, and the propriety of its admission for the purpose of opening the decree in the original cause. If decided to be founded in fact sufficient to affect the decree, and properly admissible, the original decree will be opened, and if necessary, a new hearing had; but if not so found, the bill of review will be dismissed and the original decree will stand. But even in this case, as well as in that of a pure bill of review, the evidence in the original cause cannot be discussed for the purpose of questioning the propriety of the original decree, as based on such evidence. It can be adverted

to, if at all, for the purpose of showing the relevancy and bearing of the new matter sought to be introduced into the cause." There are many other cases cited by defendant's counsel, which serve to illustrate the doctrine: *Dexter* v. *Arnold*, 5 Mason, 315; *Thomas* v. *Harvey*, 10 Wheat. 146; *Woods* v. *Munn*, 2 Sumner, 316; *Hollingsworth* v. *McDonald*, 2 Harr. & J. 230; *Jenkins* v. *Eldridge*, 2 Story, 299 *et seq.*; *Massie* v. *Graham*, 3 McLean, 41; *Hughes* v. *Jonas*, 2 Md. Ch. 289; *Lansing* v. *Albany Ins. Co.* Hopkins, 102; *Barker* v. *Barker*, 2 Woods, 241; *Burts* v. *Heard*, 11 Heisk. 472; *Cole* v. *Miller*, 32 Miss. 89; Daniells' Ch. Pl. sec. 1578; *Livingstone* v. *Noe*, 1 Lea, 55.

The doctrine stated by the United States supreme court, fortified as it is by the numerous cases cited, must govern the action of this court. There is no new matter set up which might not have been presented at the final hearing, if ordinary diligence had been exercised; and indeed there is no new matter stated in the bill of review. Hence, the only question is as to errors apparent of record. No such errors appear. The case having been set down for hearing, the same was heard at the proper time on the issues as made by the pleadings and exhibits. The plaintiffs offered no proofs, and had taken none, tending to show any infringements by the defendants, and hence the court was bound to dismiss the bill. It is true the defendants had raised by their answer the question of the validity of plaintiffs' patents, and had filed the so-called anticipatory patents, of which statutory notice had been given, said patents being sworn copies of the originals. The court on hearing dismissed the bill. It was not necessary for it to inquire into the validity of the plaintiffs' patents, because, if said patents were valid, no evidence that defendants had infringed them was offered. If the court had gone further and looked into the plaintiffs' patents and the alleged anticipatory patents, the same conclusion must have been reached. There is no error of record, and no new evidence which can serve as a basis for a bill of review in the light of the authorities *supra*.

The demurrer is sustained and the bill dismissed.

NOTE.—The special object of a bill of review as indicated by Lord Bacon in his ordinances, published in 1618, and since followed in the courts of chancery both in England and the United States, confines its operation to (1) errors of law appearing in the body of the decree or record, without further examination of matters of fact, or (2) to some new matter of fact which was unknown or could not possibly have been used at the time of the decree. The errors of law being confined strictly to such directions in the decree as call for a disposition of matters decreed, as opposed to some statutory provision or rule of law or equity (as, for instance, if a decree, setting aside a will and declaring that the deceased died intestate, should further proceed and direct a disposition of effects, contrary to the statute of administration and laws of distribution in such behalf), there would be error in law appearing on the face of the decree, and the same could therefore be reached and corrected by a bill of review.

Concerning the facts constituting new matter upon which a bill of review may be predicated, it is established that, although the proof made in a bill of review is sufficient to establish the ground set up in the original bill, it would be of no avail, unless there be good ground shown for opening and reviewing the former decree. *Carter* v. *Stennett*, 10 B. Mon. 250. A decree of the court of chancery dismissing the bill of complainants where the cause has been set down for hearing, after replication, and an order closing the proofs, is a bar to a subsequent suit for the same cause between the same parties, although no proofs were, in fact, taken. And such decree was taken by default at the hearing. *Ogsburg* v. *LaFarge*, 2 Comst. 113. If, therefore, the decree does not contain a statement of the material facts on which the decree proceeds, it is plain that there can be no relief by a bill of review; but only by appeal to some superior tribunal. Story's Eq. Pl. 407; Daniell's Ch. 1631 n.

It may be therefore broadly stated, that where there is no such error as alluded to, and no new matter sufficient to overcome the regard of courts for the repose of things adjudicated, as well as being sufficient to alter the decree itself, there can be no relief upon a bill of review.

Courts of chancery usually require a would-be complainant in a bill of review to first establish his right thereto by petition supported by affidavits, setting up the reasons relied on for relief; this proceeding under the English practice is termed a *caveat;* with us, however, granting leave to file a bill of such a nature is discretionary with the court, whether upon preliminary petition or otherwise, it being in the nature of an assignment of error *coram nobis*. The court, however, upon bill of review, has no authority to correct errors born of evidence, or to inquire, after decree passed, into the correctness of its conclusions; upon the evidence, the case of *Putnam* v. *Day* (22 Wall. 60), cited by Judge Treat in the foregoing opinion, establishes this doctrine beyond controversy. The mere propriety of a former decree cannot be questioned by bill of review; it is only where there is error on the face of it that such a bill can be sustained. *Haight* v. *Homan*, 8 Cl. & F. 324; *Mitford* v. *Tyler*, Pl. in Eq. 181; Lord Bacon's Ord. (1618); 1 Bland's Ch. 511. Fraud in

procuring a decree in equity cannot be relieved against by bill of review, but the decree must be impeached by original bill charging the fraud. *Couch* v. *Couch*, 18 Ohio, 146. A decree will not be reversed upon a bill of review, because a defense existed of which the party neglected to avail himself. *Gary* v. *May*, 10 Ohio, 66. It is expressly declared that forgetfulness or negligence of parties or their solicitors, under no incapacity, furnishes no ground for a bill of review. 1 Harr. Practice in Chancery, 175; *Franklin* v. *Wilkinson*, 3 Mon. 112; *Jones* v. *Pilcher*, 6 Mon. 425. It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere; because if a matter has already been investigated according to the common and ordinary judicial rules, a court of equity cannot take upon itself to enter into it again. *Bateman* v. *Willoe*, 1 Scho. & Lefr. 204; *Wensten* v. *Johnson*, 2 Mon. 305. E. J. O'BRIEN.

POOLE *v.* CHICAGO, ETC. R. CO.

(District of Iowa. January, 1881.)

1. JURORS — IMPROPRIETY OF.— An impropriety of jurors which did not prejudice the verdict is not ground for setting it aside and awarding a new trial.
2. SAME — MISCONDUCT — DISCUSSION OF PENDING CASE BY.—Discussion by a juror outside of the jury room, of a case pending and undecided before him, is the clearest evidence that he is not an unbiased and impartial juror, notwithstanding his disclaimer of the influence of such discussion upon his own mind.
3. SAME — TEST OF MISCONDUCT FATAL TO VERDICT.— The test of what impropriety is to be considered as prejudicing the verdict is the answer to this question: Was the misbehavior of the juror such as to make it probable that his mind was influenced by it, so as to render him an unfair and prejudiced juror?

Motion for new trial.

Hagerman, McCrary & Hagerman, for plaintiffs.

H. H. Trimble and *J. W. Blythe*, for defendant.

LOVE, *District Judge*, delivered the opinion of the court:

This case was tried by jury at the last January term in Keokuk. The jury gave a verdict for the defendant. The

plaintiff now moves for a new trial. The plaintiff is the widow and administratrix of Erastus P. Poole, deceased, who lost his life in consequence of personal injuries received in attempting to make a coupling, while in defendant's service. The action is to recover damages resulting from the injuries thus received. The plaintiff's counsel have, in support of the motion, insisted on many grounds of law and fact which I deem it needless to consider.

I shall confine what I have to say to the alleged misconduct of the jury. In this matter some very material facts, relied upon for the motion, have been disproved. Others have been so far explained by counter affidavits as to relieve the case of the bad aspect in which it might otherwise appear to the court. I shall pass all doubtful or disproved facts without notice, confining my attention exclusively to such as have been clearly proved. It undeniably appears that a number of the jurors during the progress of the trial passed several consecutive evenings at cards in the room of one of the defendant's counsel at the hotel where some, but not all, of said jurors were stopping. This was a great and reprehensible impropriety, and if it did not clearly appear that the jurors mentioned occupied the room in question without any invitation or inducement from the defendant's counsel, I would not hesitate to set aside the verdict on that ground alone. But it does appear affirmatively by the affidavits which have been filed, that the jurors occupied Judge Trimble's room under peculiar circumstances, which relieve both Judge Trimble and Mr. Blythe, his associate counsel, from any just censure or responsibility. It is due alike to the counsel concerned and to the court that the circumstances referred to should be stated and placed upon the record.

It appears that Judge Trimble and Mr. Blythe occupied separate rooms upon the same floor of the hotel. These gentlemen were closely occupied at Mr. Blythe's room till late in the evening of each day during the trial, examining witnesses and otherwise preparing their defense. Judge Trim-

ble's room was virtually unoccupied by him till a late hour of the night, and not, it appears, till the card party had dispersed. The fact that the jurors in question occupied Judge Trimble's room at all is satisfactorily explained. It appears to have been arranged that some jurors in attendance upon the court should while away their evenings at cards in the rooms of Col. Milo Smith, who was a juror of the regular panel, but not in the Poole case. It so happened that Mrs. Smith after some days reached the city, and it therefore became necessary to abandon the arrangement for meeting at Col. Smith's rooms. Thereupon John R. Wallace, who was not a juror in the case then on trial, seeing that Judge Trimble's room was unoccupied, asked him if he had any objection to their card party meeting at his room. He did not state to Judge Trimble who the persons engaged in the card playing were; and the latter, when he gave consent to their using his room, was not aware that any juror in the Poole case was of the party. It clearly and indubitably appears that when Judge Trimble and Mr. Blythe afterwards came to know that some members of the jury in the case then on trial were of the card party, they kept studiously aloof from Judge Trimble's room. It is proved clearly that Mr. Blythe was never in the room at all when the jurors were there, and Judge Trimble was in the room only once during the several nights in question, and then only for a single moment to obtain some needed papers. It appears that neither Judge Trimble nor Mr. Blythe ever, on any occasion during the trial, spoke to any jurors concerning the case, nor alluded to the same in their presence, except in open court. When Judge Trimble found that some members of the jury in the case were occupying the room as stated, he was placed in a somewhat embarrassing situation. He had given his consent to their occupancy of his room, which was practically vacant. He could not well rescind his assent and order them to vacate the room without danger of giving offense, and perhaps prejudicing his client's cause. Both he and Mr. Blythe seem to have done all that

could reasonably be expected under the circumstances; they kept aloof from the room during its occupancy by the jurors, and abstained scrupulously from making any allusion to the case on trial to any member of the jury. But the conduct of the jurors themselves was plainly inexcusable. Though it may have been the result of mere thoughtlessness, it was manifestly calculated to bring grave suspicion upon them and upon any verdict they might render. All that the public and the living suitor could know was, that several of them who were actually trying the cause were spending night after night in the rooms of the defendant's counsel. How and by what means and under what circumstances they got there; whether with or without invitation; whether with or without a purpose respecting the trial; whether to receive or not to receive hospitality, could not be known or explained to the world without. All this would be matter of mere conjecture, and what conjectures were likely to be made it is needless to say. Even those at the hotel who were informed that these jurors were engaged in an innocent game of cards for amusement, might very naturally ask why they did not occupy the room of some one of their own number who were stopping at the house. The circumstances which have been satisfactorily explained to the court were necessarily unknown to the public, and although public opinion ought by no means to influence or control the verdict of juries, yet a decent regard to the opinions of mankind is a duty not at all incompatible with the higher and paramount obligation to do exact justice between man and man.

Such conduct as I have referred to on the part of jurors while trying a cause merits the most decided reprobation. It tends directly to bring suspicion and discredit upon jury trials, and upon the administration of justice itself. No suitor could feel otherwise than aggrieved at a verdict rendered against him by jurors so demeaning themselves; and a court which should fail to discountenance such conduct when brought to its attention, would justly lose the esteem and

confidence of all just men. If there was no fact before me other than the misconduct just mentioned, I should with great reluctance permit the verdict to stand. The example would, I fear, be infinitely mischievous. I should, therefore, discarding all nice distinctions, feel inclined to put the seal of disapprobation in the most decided manner upon such misconduct by setting aside the verdict.

But there are other facts to be considered. It is shown, to my entire satisfaction, that Mr. W. H. Hope, a member of the Poole jury, in utter disregard of the instructions of the court, while the case was yet before the jury and undecided, talked freely and fully with G. W. Meredith about the case, expressing himself to the prejudice of the plaintiff and the plaintiff's counsel. Meredith says Hope began the conversation without any question from him, and that he carried it on in a sneering way, saying, among other things, that "Hagerman had the court room full of Keokuk people, who, whenever he said anything, applauded, and that Keokuk thought they had got this thing fixed up very nice," etc. It is needless to say that there was no such thing as applause in the court room. Any such manifestation would have been very quickly suppressed. Hope in his affidavit denies this, but I am constrained, nevertheless, to credit Meredith's statement. Meredith, it seems, is a respectable farmer living in Van Buren county. His character is unquestioned. He appears to have no connection whatever with the plaintiff, and no interest in the litigation. What, therefore, could have moved him to fabricate such a statement as he has made and sworn to? What motive, what inducement had he to commit voluntary and gratuitous perjury? Meredith's testimony is positive and affirmative. If false, it was wilfully false. But Hope's denial is negative. He may possibly have forgotten what he did say to Meredith, or, at all events, he may have had but a very dim and indistinct recollection of the conversation. At any rate, Hope, finding his conduct as a juror called seriously in question, had a very strong motive for denying the truth of Meredith's state-

ment, while Meredith had none whatever to make a false affidavit. It may be added that Hope was one of the jurors who, though not stopping at the Patterson House, was present with the rest at the card party there, and that we find him taking a decided and active part when the jury first retired for consultation. Mr. Carter, a member of the jury, testifies that immediately after the jury retired for consultation, Hope moved that Palmer Clark act as foreman, which was carried. Another gentleman, who was also present with the card party, then moved that Hope act as secretary, which also prevailed. The balloting then commenced. It is remarkable that some one did not move the appointment of a committee to prepare and report a proper verdict to be adopted by the jury. That was all that seemed wanting to transplant the tactics of the veteran politician in full bloom from the caucus to the jury room!

There being no evidence in the affidavits before the court to implicate the defendant in the misconduct of the jury, counsel contends that the court ought not to set aside the verdict, because the misbehavior of the jury is no ground for granting a new trial where the successful party is not at fault, and when there is no prejudice to the losing party. And in this connection the counsel argue that the verdict was clearly right, and that no other verdict could have been rendered upon the evidence. There are certainly authorities to sustain this doctrine, and with a proper understanding of what constitutes prejudice, I see no good objection to it.

But what is prejudice? Can the court say that where the jury misbehave so that the losing party has not had a fair and impartial trial, there is no prejudice, because the court may be of opinion that the verdict is right? By no means; because the losing party has a right to a fair trial by an unbiased jury, and to be deprived of this right is clearly prejudice to him. The losing party is not bound to accept the judgment of the court; he is entitled to the verdict of an impartial jury. Suppose, in a criminal case, the jury should commit the fault of

receiving information outside of court, and the judge should be of opinion that the conviction was nevertheless clearly right, could the court pronounce that there was no prejudice to the prisoner, and therefore refuse him a new trial? Clearly not; and yet there is, in this respect, no distinction in principle between civil and criminal trials. The right to a fair and impartial trial by jury is the same in both. The true idea of prejudice in this connection is this. Was the misbehavior of the juror such as to make it probable that his mind was influenced by it so as to render him an unfair and prejudiced juror? Doubtless, there may be cases of misbehavior in which the court could say without hesitation that the mind of the juror could not possibly have been affected by the misconduct imputed to him. Many illustrations may be found in the books of misbehavior without prejudice in this sense. Thus, if after the jury should find their verdict and seal it up, and before its delivery in court, a juror should talk with third persons about the merits of the case, there would be clearly misbehavior, but not prejudice in the proper sense of the word. The court might pronounce without hesitation that the communications made to the juror under such circumstances could not possibly have influenced him in finding the verdict. In such case there would be misconduct without prejudice. But where the natural tendency of what a juror does or says, or willingly listens to from others, is to bias his mind, or where his misconduct evinces a prejudgment of the case, or ill will, or passion against the losing party, the inference of prejudice in the true sense inevitably follows, because the verdict cannot be said to be the result of a fair trial.

There is no right more sacred than the right to a fair trial. There is no wrong more grievous than the negation of that right. An unfair trial adds a deadly pang to the bitterness of defeat. Now the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections than similar declarations which he may hear uttered

by other persons. When most men commit themselves publicly to any fact, theory or judgment, they are too apt to stand by their own public declaration in defiance of evidence. This pride of opinion and of consistency belongs to human nature. Where, therefore, a juryman talks outside of the jury room about a case pending and undecided before him, he gives the clearest evidence that he is not an impartial and unbiased juror. The very discussion of any matter by a juror, elsewhere than in the jury room, tends to the forming of false impressions and prejudgments. Nor will it do for a moment to accept the statement of the juror that what he has said or heard has not affected his judgment or influenced his verdict. Almost any juror, when detected in such misconduct and arraigned for it, will disclaim the influence upon his own mind of what he has uttered in violation of his duty. This is human nature. Moreover, few have either the capacity or candor to speak with any reliable certainty of the elements which enter into their own minds in pronouncing a judgment or verdict. The only safe rule for the court to follow is, to form its judgment from the natural and logical consequences of the juror's words and conduct, with little regard to his protestations in exculpation of himself. All parties, and especially corporations, have a deep concern in keeping juries strictly to the line of duty and propriety. When they deviate from that line there is no longer any security against those malign, extrinsic influences which are sure to prevent and poison the streams of justice.

An order will be entered setting aside the verdict and granting a new trial; and the court will consider a motion, if made, to rescind the order transferring the case to Keokuk for trial. It is quite evident that there is in that city a deep and all-pervading sympathy for this unfortunate plaintiff, whose home is among its citizens, and in whose sorrows they largely participate. Although this feeling is but natural, and by no means discreditable to the citizens of that city, yet the manifestation of it at the trial was so marked and so unusual as to induce a

belief that the ends of justice will probably be best subserved by a trial elsewhere.

Judge McCrary, having been of counsel, took no part in this case.

Ruiz *v.* Eickerman.

(Eastern District of Missouri. January, 1881.)

1. Bankruptcy — Discharge — Alien Creditors.— A discharge in bankruptcy under the United States bankrupt act is a bar to the claims of alien creditors suing in the courts of this country, in like manner as though they were citizens of the United States.

On demurrer to plea of discharge.

Myers & Arnstein, for the demurrer.

Marshall & Barclay, opposed.

Treat, *District Judge*, delivered the opinion of the court:

A demurrer is interposed to the answer of Eickerman, who pleads discharge in bankruptcy. The plaintiff is an alien non-resident, insisting upon his demand against the defendant, and that a discharge in bankruptcy under the laws of the United States does not relieve the defendant of plaintiff's demand.

The proposition involved pertains to international laws, concerning which there ought to be no discord. If the cases of insolvent laws, as among the states of this country *inter sese*, are considered, the fullest exposition of which is given in *Cook* v. *Moffet*, 5 How. 307; or, as to foreign demands, in *Murray* v. *DeRotterhem*, 6 Johns. Ch. 52, it will be ascertained that the rule is this: An insolvent law or a bankrupt law has no extra-territorial force. If the foreign party sues, despite the insolvent or bankrupt discharge, in the law of the forum, he must accept the rules pertaining thereto, with the

exception of such modifications as spring from the complex nature of our state and federal governments. As the laws of the federal government in bankruptcy are supreme, a discharge thereunder is sufficient whether the creditor is a citizen of a state other than that in which the bankrupt is a resident, or is an alien, a resident of a foreign country. Of course there can be no extra-territorial operation of a United States statute as to the discharge of a personal obligation. When the intra-territorial law has granted such a discharge as to all creditors, the foreign creditor suing in the domestic tribunal is subject to the *lex fori*, and his right to sue is dependent thereon.

The plaintiff in this suit had a cause of action against the defendant. The plaintiff was a non-resident and citizen of Spain, and as such could have recovered judgment. But defendant availed himself of provisions of the bankrupt act, under which the plaintiff could by proper proceedings have proved his demand and shared in dividends made. He elected not to do so, and therefore his demand is discharged as to this defendant, so far as the United States law operates — that is, within the territorial limits of the United States. The discharge in bankruptcy is valid in the absence of fraud in whatever court of the United States a suit is brought, although it may not protect the defendant from a suit brought in a foreign jurisdiction if he should be found therein. The demurrer to this special answer of Eickerman is overruled.

THE NORTHERN PACIFIC R. CO. *v.* THE ST. PAUL, MIN. & MAN. R. CO.

(District of Minnesota. December, 1880.)

1. EQUITY — INJUNCTION — BOND OF INDEMNITY. — Courts of equity will sometimes substitute a bond of indemnity for an injunction, if the ends of justice will thereby be promoted, and especially if any public interest may suffer by continuing the injunction in force pending the litigation. It is within the power of a court of chancery to accept such a bond when proceeding according to the general principles of equity.

2. SAME — SAME — SAME — RULE IN FEDERAL COURTS.— The general principles of equity are administered by the federal courts of equity in all cases and in every state irrespective of local laws and state practice.
3. SAME — APPLICATION OF RULE.— Held, therefore, in this case, where a prompt assessment of damages could not, in all probability, be had, and where the right of the complainant to any damages was matter of dispute, depending for its solution upon doubtful questions of law and fact, that a court of chancery, instead of stopping the progress of a great work of internal improvement, of general and public as well as of private importance, require a bond to be given and allow the construction to go on.

Motion to dissolve injunction.

The facts are stated in the opinion.

Gilman & Clough, for complainant.

R. B. Gallusha and *Bigelow, Flandreau & Clark*, for respondents.

MCCRARY, *Circuit Judge.*— The complainant owns and has for years operated a line of railroad running across the state of Minnesota, constructed by virtue of authority conferred by certain acts of congress in this bill mentioned. The respondents are the owners of another line of railroad, now in process of construction under authority conferred by the state of Minnesota, as alleged in the answer. Each of these companies has power to acquire by purchase or condemnation the land required for right of way, depot grounds, etc. The lines of the two railroads cross each other at a point near Fargo in this state, the exact point of crossing being on the northwest quarter of section 9, township 139, range 8, in the county of Clay, Minnesota. In 1872 the plaintiff company entered upon this land and took, without condemnation, so much of the same as is now occupied by it for right of way, and has ever since operated its railroad across the same.

At the time of the passage of the act of congress incorporating the complainant company, the land in question was public land; but at the time of the definite location of the

line of the road under that act, said land was owned by one J. S. Schreiber, who in the meantime had obtained a patent therefor, and from whom, through several mesne conveyances, the title passed to the respondents. No proceedings under the statute of Minnesota to recover damages for the right of way were ever instituted by said Schreiber, or any of his grantees, against the complainant. The respondents claim, under these circumstances, that they are the owners of the land and have the right to construct their railroad across it, and in doing so, to cross the track of complainant, without making compensation. The complainant claims that it has a vested right and a valuable property in its right of way, which cannot be taken by the respondents without condemnation, under the statute, and payment of damages. Numerous questions, arising upon the admitted facts, have been discussed by counsel, the more important of which are the following:

1. Whether, under the charter of the complainant company (act of congress of July 2, 1864), that company acquired the right of way over all lands that were public at the time of its passage, or only over such as were public at the time of the location of the line.

2. Whether the respondents or those under whom they claim had a complete title to the *locus in quo* at the time the complainant entered upon the same; and

3. If so, whether by permitting the complainant to take the right of way, and use the same for eight years, the respondents and their grantors lost their rights therein, and the complainant acquired a vested right.

4. Whether the respondents' right to claim so much of the land as is embraced within complainant's right of way is barred by section 7 of the aforesaid act of congress.

Besides these questions which arise upon the admitted facts, there is another which depends for its decision upon facts which are controverted. It is alleged in the answer that the plaintiff well knew that the enterprise in which respondents had embarked "involved the crossing of plaintiff's road at or

near the point of crossing aforesaid, and that the place and manner of said crossing, as aforesaid, were fully explained to the plaintiff, and that the plaintiff expressly assented to and approved the place and manner of crossing, as aforesaid, and represented to the defendants and gave them to understand that they could and should be permitted to build and operate the said Barnesville & Moorhead Railroad across the said plaintiff's road at the place aforesaid whenever and as soon as they desired so to do, and that they would assist in effecting such crossing, and that no obstacle would be interposed thereto. And that after such representations and license and in firm reliance upon the same, and without and before any notice or knowledge that the said representations would not be carried out in good faith, or of any design on the part of the plaintiff to interpose any obstacles whatever to such crossing or to attempt so to do, the said defendant companies went on and expended large sums of money in the construction of said road, to wit: several hundred thousand dollars," etc. These allegations are denied by certain affidavits filed by complainant; but it is manifest that the question of fact thus presented cannot be finally decided until the final hearing upon the testimony. The right of the complainant to damages for the crossing of its track on the land above described by the respondent's railroad depends upon the decision of these several questions, some of which are by no means free from difficulty, and one of which (the last named) cannot be finally determined until the final hearing. In such a case the usual course is to continue the injunction in force and thus keep the parties in *statu quo* until the final hearing. But this rule has its exceptions. Courts of equity will sometimes substitute a bond of indemnity for an injunction if the ends of justice will thereby be promoted, and especially if any public interest may suffer by continuing the injunction in force pending the litigation. There are several cogent reasons which should impel us to adopt this latter course in the present case, if upon examination it is found to be within our discretion to do so.

1. Whatever doubts we may have upon other questions, we have none as to the absolute right of the respondents to build their railroad along the line specified in their charter, and to cross the line of the complainant at the point in controversy, upon paying the damages, if it be finally decided that complainant is entitled to damages, and without such payment, if upon final hearing it shall be so determined. The most that the complainant is entitled to is its damages; and if that be amply secured its rights are protected.

2. The case is peculiar in this: that the controversy is not as to the amount of damages, but as to the right of complainant to any damages. It is not a controversy that can be settled in a few days by the appointment of a board of commissioners to assess the damages of complainant. As already suggested, the right of complainant to damages may depend upon a disputed question of fact, which cannot be determined until proofs are taken in the regular course of proceedings. Enough has already appeared in the case to satisfy us that a somewhat protracted litigation may precede the determination of the question of damages. Already the proceedings instituted in the state court for the purpose of having the complainant's damages assessed have been interrupted and delayed by a removal thereof into this court, where they are now pending. We will not anticipate, much less decide, any of the questions that may arise here in that proceeding. It is enough for the present to say that the controversy which must precede an assessment and payment of damages in this case may be protracted.

3. The public is interested in the construction of new lines of railway, which are indeed only improved highways. The policy of the law is to encourage and facilitate such construction. The statute of Minnesota provides for railroad crossings upon the theory that the public interest requires that these highways of commerce and travel should run in different directions over the state, and that no one line shall erect a barrier not to be passed by others. It is manifest from these

considerations, and others that might be named, that the respondent companies ought to be permitted to complete their line across that of the complainant at the earliest moment compatible with the full and complete protection of the rights of the latter. That these rights can be fully and completely protected by requiring the respondents to give bond with approved security to pay the damages which may be awarded to complainant is entirely clear.

But we are met with a question as to the power of this court in a case of this character to adopt this course. It is not necessary to cite authority to show that to accept such a bond is within the ordinary powers of a court of chancery when proceeding according to the general principles of equity. It is a mode of proceeding not only authorized by the general principles of equity jurisprudence, but it is in common use in courts of chancery, and especially in federa. courts. In patent cases, for example, where it is supposed that an injunction to restrain the use of a patented article may operate injuriously, the complainant is protected by a bond to account for profits and pay damages, instead of an injunction. It is only necessary to add that the federal courts of equity administer the same general principles in all cases and in every state, irrespective of local laws and state practice. If the court has jurisdiction to try and determine a case in equity, it must determine it according to these general principles, which are the same in every state. *United States* v. *Howland*, 4 Wheat. 115; *Boyle* v. *Zacharie*, 6 Pet. 658; *Nevin* v. *Scott*, 13 How. 268; *Noonan* v. *Lee*, 2 Black, 499.

It is not necessary, in view of these authorities, to decide what the power of a state court might be in a case of this character; but we see nothing in the statute which in our judgment ought to be construed to forbid a court of chancery of the state to accept a bond under the circumstances disclosed by the record in this case. It may be suggested that a bond cannot be substituted for payment of the damages. After the damages are assessed, the amount ascertained, this may be so.

But the question here is, whether, in a case where a prompt assessment cannot, in all probability, be had, and where the right of the complainant to any damage is a matter of dispute, depending for its solution upon doubtful questions of law and fact, a court of chancery may, instead of stopping the progress of a great work of internal improvement, of general and public as well as of private importance, require a bond to be given, and allow the work to go on. The statute itself recognizes the propriety of substituting a bond for the actual payment of the damages, even after assessment, in case an appeal is prosecuted (see sec. 23, ch. 34, Statutes of Minnesota).

It is said to dissolve this injunction and accept a bond instead would in effect authorize the respondents to commit a trespass, if not a crime, by laying their track across that of complainant. After this court has decided that upon giving bond the respondents may extend their track across that of complainant, and after such bond shall have been given and approved, the right of the respondents to go on with the construction of their line and to cross that of the complainant will be no longer open to dispute or question. The case is before us; our jurisdiction of the parties and the subject-matter is complete.

The order will be that the injunction be dissolved upon the execution by the respondents to the complainant of a bond, with sureties to be approved by a judge of this court, in the sum of $5,000, conditioned that the respondents will pay all damages which may be awarded or adjudged in favor of complainant by reason of the construction of respondents' line of railway across that of complainant.

OSTRANDER *v.* MEUNCH.

(Eastern District of Missouri. March, 1881.)

1. ASSIGNMENT UNDER STATE LAW — BANKRUPT ACT.— An assignment for the benefit of creditors under state law is void as against an assignee in bankruptcy under act of congress, but is not void *ab initio*. It is subject to be avoided under proceedings taken under the bankrupt act.
2. SAME — SAME — DEMAND FOR ASSETS — INJUNCTION.— Where an assignee in bankruptcy was appointed after an assignee under state law had taken possession of the estate, he was entitled upon demand to all the assets in the hands of the latter. It was not necessary to apply for an injunction to restrain the assignee under the state law from disposing of them.

In bankruptcy. Appeal from the judgment of the district court.

Mr. Krum, for appellant.

———, for appellee.

MCCRARY, *Circuit Judge.*— It is well settled that an assignment for the benefit of creditors under a state law is void as against an assignee in bankruptcy under the national bankrupt act. But it seems that the assignment under the state law is not absolutely void *ab initio*, but only subject to be avoided by proceedings taken under the bankrupt act.

In the present case it appears that the assignee, under the state law, had taken possession of the estate and partially executed the assignment prior to the adjudication in bankruptcy. The assignee in bankruptcy, soon after being qualified and receiving a conveyance of the estate from the register, made formal demand in writing upon the assignee, under the state law, for the estate. The latter, however, continued to dispose of a part of the estate by paying therefrom certain dividends. The court below instructed the jury that this he had no right to do, and that he was consequently liable to the assignee in bankruptcy for the assets in his hands at the time the demand was made. It is said that the assignee in bankruptcy was

bound to enjoin the further proceedings under the state law, and that he is therefore not entitled to recover for the amount paid out as dividends after demand. This point is not well taken. The title to the estate passed to the assignee in bankruptcy before he demanded it. From the time of the conveyance of the assets to the assignee in bankruptcy the latter was their owner, and the assignee under the state law ceased to have any power to dispose of them or appropriate them in any manner. It was the case of property belonging to one person, and found in the possession of another. No injunction was necessary. A demand was quite sufficient. There is no error in the proceedings, and the judgment of the district court is accordingly affirmed.

SCHOFIELD *v.* THE CHICAGO, MILWAUKEE & ST. PAUL RAILROAD COMPANY.

(District of Minnesota. June, 1881.)

1. DIRECTING A VERDICT.—It is now settled in the federal courts that if, upon the evidence, the court would set aside a verdict against the party, if rendered, it is its duty to charge the jury not to return such a verdict. Upon a motion to direct a verdict for the defendant the question is, whether if a verdict were rendered for plaintiff upon his evidence, the court would set it aside as being contrary to the evidence.
2. CROSSING RAILWAY TRACK — DUTY OF LOOKING OUT — CONTRIBUTORY NEGLIGENCE.— As there is great danger in crossing a railroad track where trains are liable to pass at any time, great care is demanded alike of the engineer in charge of the locomotive and of the traveler upon the highway. Their rights, duties and obligations are mutual and reciprocal. Both must look out for danger.
3. SAME — SAME — SAME.— *Held*, accordingly, that where the plaintiff was familiar with the crossing, and where he had a fair view of the railroad from the depot to the crossing, about seventy rods, and could have seen the track for that distance any time after approaching within six hundred feet of the crossing, it was contributory negligence for him to drive upon the track without looking for an approaching train, and he could not recover even if the engineer was also guilty of negligence in running the train at a great and dangerous speed, and in failing to give warning of his approach by sounding the whistle or ringing the bell.

Schofield v. The Chicago, Milwaukee & St. Paul R. R. Co.

Action for damages for personal injuries received by plaintiff while driving a horse and sleigh across the railroad track of defendant.

On motion that the court instruct the jury to find for the defendant, on the ground that the plaintiff's evidence, being all in, shows contributory negligence on his part.

Pierce & Congdon, for plaintiff.

Bigelow, Flandreau & Clark, for defendant.

McCrary, *Circuit Judge.*— The plaintiff having closed his evidence, the defendant moves the court to instruct the jury to find for defendant, upon the ground that the plaintiff by his own showing was guilty of negligence which contributed to the accident by which he was injured. It is now settled law so far as the federal courts are concerned, that if, upon the evidence, the court would set aside a verdict against the party, if rendered, it is its duty to charge the jury not to return such a verdict. *Pleasants* v. *Fant*, 22 Wall. 116.

This rule devolves upon the court, upon this motion, the duty of determining whether, upon the evidence as it stands, a verdict for plaintiff could be upheld. The question is not whether upon the facts, in the opinion of the court, such a verdict ought to be rendered; if the court were to assume that to be the question, it would usurp the province of the jury. The question is whether, if a verdict were rendered for plaintiff upon his evidence now in, the court would set it aside upon motion as being contrary to the evidence; and it is to be judged by the same rules that would prevail upon the consideration of such a motion after verdict. Let us inquire, then, whether upon the evidence the question of contributory negligence is fairly open for the consideration of the jury, and may be decided either way within their discretion. The undisputed facts upon which defendant bases this motion are the following:

First. The plaintiff was familiar with the crossing; had often passed it, and the usual sign, printed in large letters over

it, gave express warning to persons on the highway to "look out for the cars."

Second. At the place of crossing, the highway and railroad are nearly on a level, and for a distance of at least six hundred feet before reaching the crossing the plaintiff had a full view of the railroad from the depot to the crossing, a distance of seventy rods, and for a distance of about thirty-three feet, upon coming to the track, he could see beyond the depot, a distance of some twenty rods.

Third. If at any time after the train passed the depot the plaintiff had looked in that direction he would have seen it, and if not then too near the train for escape, by stopping his horse he could have avoided the accident and injury.

That these facts, standing alone, show contributory negligence on the part of plaintiff, is too plain to admit of doubt or argument.

But there is evidence tending to establish other facts, and these, for the purpose of this motion, must be taken as established. Being so regarded, the plaintiff claims that they authorize a verdict in his favor notwithstanding the facts and circumstances above enumerated. These latter facts are as follows:

First. The train was not a regular one, and no train was due at the time of the accident.

Second. The train was moving at an unusual and dangerous rate of speed.

Third. The train did not stop at the depot, as trains usually do, but not always.

Fourth. There was no signal by blowing the whistle or ringing the bell after the train passed the depot.

These facts, if established, would clearly show negligence on the part of the defendant, and I therefore assume, for the purposes of this motion, that such negligence is established. This, however, does not of itself necessarily authorize a verdict for the plaintiff. If there was mutual fault — if both plaintiff and defendant were guilty of negligence — then, unless the defendant acted wantonly, there can be no recovery.

Both parties were bound to exercise such care as under ordinary circumstances would avoid danger; such care as men of common prudence would ordinarily use under the circumstances. The degree of care required in such cases depends upon the danger. As there is necessarily great danger in crossing a railroad track where trains are liable to pass at any time, great care is demanded alike of the engineer in charge of the locomotive and of the traveler upon the highway. Both have the right to pass, and their rights, duties and obligations are mutual and reciprocal, and the same degree of care is required of each. The whole law of the case may be summed up in these words, taken from the opinion in the case of *Continental Improvement Company* v. *Stead*, 95 U. S. 165: "Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty." If neither party keeps a careful lookout for danger, and an accident and injury ensues, there is no cause of action. Do the facts relied on by plaintiff excuse him from the duty of looking out for danger by looking towards the depot for a coming train before driving on to the track? If not, do they show that by defendants' negligence the plaintiff was disabled from preventing the accident by ordinary prudence? It was a special and not a regular train. This fact may be considered as bearing upon the degree of care and caution required of plaintiff; but I am unable to hold that it excuses him from the duty of looking out for a coming train. It is common information that special trains are frequently run over all important lines of railroad, and no case has gone so far as to hold that a traveler crossing a railroad track is only bound to look out for regular trains.

I assume that the train was moving at an unusual and dangerous rate of speed. This very clearly did not relieve the plaintiff from the duty of looking out, but it presents the question whether he had time after he could have seen the

train by looking to have avoided the accident by ordinary prudence; of this I will speak hereafter.

The train did not stop at the depot. The proof is that trains usually stopped there, but that they sometimes passed without stopping. This fact could only avail the plaintiff upon the theory that he heard the whistle announcing the approach of the train, and, supposing that it would stop at the depot, did not look to see whether it did so or not. If such was the fact, the plaintiff was plainly negligent for these reasons: First. He could not reasonably assume that the train would certainly stop at the depot, since that was not the invariable rule. Second. Being warned that a train was approaching and thus put upon his guard, there were the most cogent reasons for looking out, and it was heedlessness to neglect to do so. A more difficult question is presented by the fact, which I assume as true, that no warning by ringing the bell or blowing the whistle was given of the approach of the train to the crossing.

Counsel for plaintiff insists that the neglect of the engineer to sound the whistle or ring the bell on nearing the crossing relieved the plaintiff from the necessity of looking for the coming train before attempting to cross, and he has cited some authorities to sustain this view. If this were an open question in the federal courts, I should feel bound to consider it very carefully, as it is certainly one of importance both to the railroad companies and the public. But in my judgment the question is settled adversely to the plaintiff by the decisions of the supreme court of the United States, by which I am of course bound. In the case of the *Continental Improvement Company* v. *Stead*, 95 U. S. 161, the supreme court say: "On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentive to caution, for their lives are in imminent danger, if a collision happens; and hence it will not be presumed without evidence that they do not exercise proper

care in a particular case. But notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them; such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case they cannot obtain reparation for their injuries even though the railroad company be in fault. They are the authors of their own misfortunes."

In the case of the *Railroad Company* v. *Houston*, 95 U. S., 697, this precise question was considered. It is true that in that case the person killed was crossing the track a short distance away from the public crossing, but the court distinctly say that, aside from this fact, "the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from taking ordinary precautions for her safety." And the court further say that "negligence of the company's employees in these particulars" — that is, in regard to the sounding of the whistle or the ringing of the bell — "was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track in order to avoid an approaching train, and not to walk carelessly into a place of possible danger. Had she used her senses she could not have failed both to hear and to see the train which was coming. If she omitted to use them and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If using them she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

Upon the authority of these cases I am bound to hold that the failure of the engineer to give the customary signals of the approach of the train did not relieve the plaintiff from the duty of looking back at least as far as the depot before

going upon the track. This brings me to the only remaining question in the case. Was the velocity of the train so great that if the plaintiff had used ordinary care and caution he would have been unable to prevent the accident? Ordinary prudence required the plaintiff to look for a coming train before proceeding so near the track as to be unable to prevent a collision. If one drives his horse so near the track as to be in danger from a passing train, he cannot excuse himself upon the ground that he was unable, after looking, to escape unhurt. He must look out in time to avoid a train if one is approaching, provided always that there is a clear view, so that he is not deprived of the means of looking. But it is said that he could not see the approaching train beyond the depot unless he looked at a distance of thirty-two feet from the crossing. This is true, but the distance to the depot was seventy rods, and even if the train was moving at the extraordinary speed of fifty miles an hour, it must have passed the depot when the plaintiff was at least one hundred feet from the crossing. While a train running at fifty miles an hour is traveling seventy rods, a horse, even if walking, would travel at least one hundred feet. It is highly improbable either that the train was moving at that speed or that the horse, on a severely cold day, would move at a slow pace. But giving the plaintiff the benefit of every doubt, it remains manifestly true that the plaintiff, when within one hundred feet of the crossing, might have seen the train coming from the depot, and might have avoided the accident by stopping until it passed by.

It is of the utmost importance that the rules of law governing this question of negligence on the part of the employees of railroads, as well as on the part of the traveling public, should be thoroughly understood and rigidly enforced. Railroads are being rapidly constructed in every direction; they necessarily intersect the common highways at numerous points. The rules of law to which I have referred, requiring equal care and caution on the part of those who run railroad trains and those who travel the highways, if obeyed, will prevent acci-

dents. We must hold all parties to its strict observance. Because this, in my judgment, is a case in which these rules were disregarded by the plaintiff, I am constrained to hold that he cannot recover, and therefore sustain the pending motion. I am the better satisfied with this ruling, because the case would, I presume, in any event go to the supreme court, and upon the record thus made up the plaintiff can take exceptions and have the questions upon which he relies fully and fairly presented to that tribunal.

PETERS *v.* THE LINCOLN & N. W. R. R. Co. *et al.*

(District of Nebraska. May, 1881.)

1. RAILROAD COMPANY — LEASE OF ROAD — ASSENT OF STOCKHOLDERS — STATUTE CONSTRUED. — Section 94, chapter 2, General Statutes of Nebraska, which authorizes any railroad company in that state to lease its road, provided no such lease shall be perfected until a meeting of the stockholders shall have been called, "and the holders of at least two-thirds of the stock of such company, represented at such meeting either in person or by proxy, voting thereat, shall have assented thereto," construed as mandatory, and as avoiding a lease executed without the assent of the stockholders in meeting assembled.
2. SAME — NECESSITY FOR MEETING OF STOCKHOLDERS. — The meeting, and the vote at such meeting, of the stockholders cannot be dispensed with on the ground that the assent of the stockholders has been expressed in some other mode. The meeting, and discussion and deliberation in such meeting, are of the essence of the act required by the statute.

This is a bill in equity, brought to enforce a contract alleged to have been entered into between the Lincoln & Northwestern Railroad Company and the Atchison & Nebraska Railroad Company, whereby the latter company agreed to lease the railroad belonging to the former.

The controlling question in the case arises upon the construction of section 94, chapter 2, General Statutes of Nebraska, title "Corporations," pages 190 and 191, which section is as follows:

"Section 94. Any railroad company heretofore or hereafter incorporated may, at any time, by means of subscription to the capital stock of any other company, or otherwise, aid such company in the construction of its railroad, for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing such aid, or any railroad existing in pursuance of law may lease or purchase any part or all of any railroad constructed by any other company, if said company's lines of said road are continuous and connected as aforesaid, upon such terms and conditions as may be agreed on between said companies respectively; or any two or more railroad companies whose lines are so connected, may enter into an arrangement for their common benefit consistent with, and calculated to promote, the objects for which they were created: *Provided*, that no such aid shall be furnished, nor any purchase, lease or arrangement perfected, until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place and in manner as they shall designate, and the holders of at least two-thirds of the stock of such company, represented at such meeting either in person or by proxy, and voting thereat, shall have assented thereto."

This section is part of a general law in Nebraska under which both of said railroad companies were organized. Respondents demur to the bill upon the ground that it does not aver that the alleged contract of lease was assented to by the stockholders of the respective corporations by vote in stockholders' meeting.

E. Wakeley, for complainants.

T. M. Marquett, for respondents.

McCrary, *Circuit Judge.*—The bill does not allege that the agreement to lease was assented to by the stockholders of either of the companies, in stockholders' meeting assembled, as required by the statute; but it is insisted that it does show

such assent in fact, and that the provisions of the statute requiring a meeting of the stockholders, and a vote upon the question at such meeting, may be regarded as directory only, and not mandatory. The language of the statute is that no lease of one railroad by another shall be perfected "until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place and in manner as they shall designate, and the holders of at least two-thirds of the stock of such company, represented at such meeting either in person or by proxy, voting thereat, shall have assented thereto."

Can the meeting, and the vote at such meeting, be dispensed with, on the ground that the assent of the stockholders has been expressed in some other mode?

The distinction between things which are of the essence of the act required by the statute to be done, and those which are not of the essence, is recognized. *Marchant* v. *Langworthy*, 6 Hill, 646; *Girardo* v. *Riley*, 52 Mo. 117; *Rex* v. *Laxdale*, 1 Burr. 447; Dwarris on Statutes, etc. 222.

Such provisions of a statute as relate to the former are mandatory; but such as relate to the latter, as, for example, to matters of form, or time and manner, and not appearing essential to the judicial mind, may be regarded as directory only.

The legislature has seen fit to provide that no lease of a railroad in this state, executed by one railroad company to another, shall be completed until a meeting of the stockholders of both companies shall have been called by the directors thereof, nor until such lease has been assented to by the votes of at least two-thirds of the stock represented. In our judgment, the stockholders' meeting and the vote in such meeting upon the question of assenting to the proposed lease, are matters of essence, of substance, and not of mere form. The legislature, for reasons which readily suggest themselves to us, thought fit to prohibit the leasing of railroads by one railroad company to another, without the deliberate consideration of the

question by the stockholders in meeting assembled, and without a formal expression of opinion by vote at such meeting. It is well known that a very common mode of combining and consolidating different lines of railroad, is by lease executed by one company to another. The policy of the legislature was undoubtedly to put certain limitations upon such consolidations, by providing for a consideration of the question, in each case, by the stockholders in their corporate capacity. For the purpose of deciding such a question, the stockholders, when assembled under the law for deliberation, represent and act for the corporation. Their assent individually obtained outside of such meeting, and in the absence of deliberation, would bind no one. The rule is well settled that where the board of directors of a corporation is authorized to act upon a subject, that action must be had by the board in its organized capacity, and not by the individual members outside of a board meeting.

When the powers of the corporation upon any given subject are to be exercised by the stockholders in meeting assembled, and by vote at such meeting, it is plain that the same rule prevails. The action of such stockholders outside of such meeting is individual action only; it is not such action as the law requires; it does not bind the corporation. Many reasons might be suggested in support of such a rule. As intimated above, it may have been for the purpose of placing limitations upon the power of combination and consolidation between different lines of railroad, thus encouraging competition.

It is perhaps enough in the present case to say that the statute has in plain terms required the stockholders' meeting and the vote by two-thirds of the stock represented at such meeting. The meeting and the vote are not matters of form, but they are the very things which the statute requires. But it may be further suggested that the statute was doubtless framed with a view to secure deliberation upon the question in each case. The value of discussion, of a comparison of views, of a hearing in open debate of all sides, and of a fair vote in open

meeting, after such consideration, cannot be questioned. If, for example, it were conceded that the meeting and the vote were non-essential, and that the assent of the stockholders, however secured, would be sufficient, it is easy to see that in every case of doubt the policy of appealing to the stockholders, individually and separately, and securing their assent when only one side of the question is presented, would be adopted. Experience teaches that signatures obtained to an assent in this way might not represent the interest of the stockholders, and that upon a hearing and discussion of the question in open meeting, a very different result might be reached. These are probably some of the reasons which influenced the legislature to enact the statute in question. Certain it is that the statute, in our judgment, establishes a wise public policy, and must be upheld and enforced by the courts, and under it the proposition to lease, set out in the bill, does not amount to a valid contract which can be specifically enforced.

If the complainants were injured by the representations made by the board of directors of the Atchison & Nebraska Railroad Company, in the circular of June 24, 1879, it may be that they have a right of action to recover their damages. All that is determined now is, that the bill does not show a binding contract for a lease between the two companies, and for this reason the demurrer is sustained.

DUNDY, *District Judge*, concurs.

RECTOR *v.* GIBBON *et al.*

(Eastern District of Arkansas. April, 1881.)

1. ACT OF CONGRESS OF MARCH 3, 1877, IN RELATION TO HOT SPRINGS, ARK., RESERVATION — DECISION OF COMMISSIONERS.—The decision and judgment of the commissioners appointed under the provisions of the act of congress approved March 3, 1877, entitled "an act in relation to the Hot Springs reservation in Arkansas," upon questions of law and

fact submitted to them in accordance with the terms of said act, held to be in the nature of a final adjudication and conclusive upon the parties.

2. SAME — SPECIAL TRIBUNAL.— Where the law has confided to a special tribunal the authority to hear and determine certain matters, the decision of that tribunal within the scope of its authority is binding upon all parties.

3. LEASE — IMPROVEMENTS — WANT OF TITLE IN LESSOR.— Upon a proper construction of the said act of congress, the commissioners were right in holding that they were not bound to recognize any right to purchase in the complainant, who, without any title, legal or equitable, had assumed to execute leases upon the land, and to bind the lessees to pay him rent, and to sell him their improvements. Such leases are void.

On demurrer to bill.

The land in controversy is a part of what is known as the Hot Springs reservation, in Garland county, Arkansas. The facts as they are set forth in the bill are substantially as follows:

About the year 1839 the complainant entered into possession of said land. On the 21st of February, 1873, the complainant, through his trustee, made and executed a lease of the premises to respondents, Gibbon and Kirkpatrick. Said lease was declared to be for the purposes of a hotel, bath-house, etc., and the lessees were to pay rent at the rate of $500 a year, and $1,500 a year for water privileges. The term was to be three years and three months, beginning on the 21st day of February, 1873, and it was provided that the improvements mentioned therein to be erected by the lessees were not to cost more than $12,000, and that at the end of the term the lessor should have a right to take said improvements by paying two-thirds of the first cost thereof, and should take the furniture in said hotel and bath-house by paying its actual value, so that the same should not exceed $8,000. Said lease also contained the following provision:

"The said Gibbon and Kirkpatrick, parties of the second part, hereby agree with Rector, party of the first part, that upon the termination of this lease, upon the terms hereinbefore specified and set forth, they will deliver to said Rector,

party of the first part, or to his successors in office or grantees, or to whomsoever at that time in law may have the right to control said trust property, all the lands that are hereinbefore leased or demised to the parties of the second part by said party of the first part promptly, without failure and free from let or hindrance of any kind whatever, together with all the buildings, outhouses and improvements that may be erected on said premises."

Before said lease was executed, the plaintiff had made certain improvements of the value of $1,000. After said lease was made a hotel was built on the premises, and a short time before the expiration of said lease the same was, by agreement, extended until some time in the future, when it might be terminated by written notice.

In 1877 the lessees sold and transferred to David Ballantine all their right and claim to said premises. While the original lessees were still in possession, plaintiff gave them the required notice to terminate the lease, and requested them to furnish a list of the furniture coming within its provisions, which they failed to do, so that no settlement was ever made. The bill also alleges the death of David Ballantine, and makes his administrator and heirs parties defendants.

Soon after the passage of the act of congress entitled "An act in relation to the Hot Springs reservation in the state of Arkansas," approved March 3, 1877, and the appointment of the commissioners therein provided for, they caused the survey of the above mentioned leased lands, and a map of the same was made designating the premises as certain lots in block eighty-nine in the town of Hot Springs.

It appearing that said hotel and certain other improvements were in the street, they were by the commissioners condemned and torn down and destroyed. In less than six months after the first sitting of said board of commissioners, the plaintiff filed his claim before them to purchase said lots, and the heirs of said David Ballantine filed a like claim; and on a hearing of these matters before said commissioners, they awarded the

right to purchase said lots to said heirs, although, as the bill alleges, it was fully shown to them that the said David Ballantine, their ancestor, had acquired his possession thereof in no other way than by said lease made by the plaintiff to said Gibbon *et al.* It is therefore averred that the respondents should be held to hold said lots as trustees for the use of complainants, who offer to pay any sum that may be found to be due the defendants, or either of them, by reason of any money they may pay out for the purchase of said lands.

The prayer is for an accounting, and that respondents be decreed to hold the land as trustees for complainant, and required to convey the same to him, and for general relief.

F. W. Compton and *U. M. Rose*, for complainant.

M. W. Benjamin, *Jno. M. Harrell* and *Clark & Williams*, for respondent.

McCrary, *Circuit Judge.*—Two questions have been discussed by counsel in this case, to wit:

First. Whether the decision of the commissioners appointed under the provisions of the act of congress of March 3, 1877, entitled "An act in relation to the Hot Springs reservation in Arkansas," upon questions of law and fact submitted to them in accordance with the terms of the act, is in the nature of a final adjudication and conclusive upon the parties.

Second. Whether, assuming that this court may pass upon the correctness of the decisions of that commission, the same ought upon the merits to be declared erroneous and set aside.

In considering the first of these questions, it is necessary to determine from an examination of the act of congress, the nature of the duties and the extent of the powers of the commission. We shall be aided in our inquiry by a glance at the history of the Hot Springs reservation, and of the legislation and litigation concerning the title thereto. For nearly half a century the title to this reservation has been in controversy.

It was reserved from sale under an act of congress approved April 20, 1832 (4 Stat. 505); and until the passage of the said act of March 3, 1877, no law has subjected it to sale, pre-emption or location.

Certain persons, and among them complainant, claimed title to portions of the reservation derived under "An act for the relief of the inhabitants of the late county of New Madrid, in Missouri territory, who suffered by earthquakes," approved February 17, 1815. 3 Stat. 211. In order to settle the controversies which existed, and with special reference to the settlement of the claims made under the said "New Madrid grant," congress passed the act of May 31, 1870, entitled "An act in relation to the Hot Springs reservation in Arkansas." 16 Stat. 149. That act authorized any person claiming title, either legal or equitable, to the whole or any part of the reservation, to institute suit against the United States in the court of claims within ninety days from the passage of the act. The proceedings were to be by petition in the nature of a bill in equity, and provision was made for a final adjudication upon the conflicting claims of all parties, as well as between each of them and the United States. The fifth section provided that, in the event of a final decision in favor of the United States, the court "shall order such lands into the possession of a receiver, to be appointed by the court, who shall take charge of and rent out the same for the United States, until congress shall by law direct how the same shall be disposed of," etc.

Under this act the complainant, Rector, brought suit in the court of claims to recover the land now in controversy. The decree of the court of claims was in favor of the United States and adverse to the complainant. Upon appeal to the supreme court the decree of the court of claims was affirmed, the supreme court declaring that none of the claimants were entitled to the lands in question. 92 U. S. 698. In the opinion the claim of the complainant, Henry M. Rector, is fully considered and held to be untenable. It was, however, suggested that congress would doubtless take into consideration any

hardship that might ensue from the decision, when dealing with the subject of the future disposition of the lands. Such was the situation when the act of March 3, 1877, was passed. That act dealt with the Hot Springs reservation as a part of the public lands of the United States, but at the same time it provided, as we shall see, for ascertaining and protecting the rights of occupants and claimants with respect to improvements.

The act provides for the appointment by the president of three discreet, competent and disinterested persons, who shall constitute a board of commissioners, with authority to perform and discharge the duties specified by the act. The commissioners were required to take and subscribe the usual oath for civil officers, to sit at the Springs, to give notice of their meeting, and to organize by electing one of their number as chairman. The fifth and sixth sections of said act are as follows:

"Section 5. That it shall be the duty of said commissioners to show by metes and bounds on the map herein provided for, the parcels or tracts of lands claimed by reason of improvements made thereon, or occupied by each and every such claimant and occupant on said reservation; to hear any and all proof offered by such claimants and occupants and the United States in respect to said lands and in respect to the improvements thereon; and to finally determine the right of each claimant or occupant to purchase the same, or any portion thereof, at the appraised value, which shall be fixed by said commissioners; provided, however, that such claimants and occupants shall file their claims, under the provisions of this act, before said commissioners within six calendar months after the first sitting of the said board of commissioners, or their claims shall be forever barred; and no claim shall be considered which has accrued since the twenty-fourth day of April, eighteen hundred and seventy-six."

"Section 6. That the said commissioners shall have power to compel the attendance of witnesses and the production of papers touching the occupancy or improvements of or on said lands, or any other matter in any wise belonging or appertain-

ing either to the said lands or the improvements thereon; shall have power to examine under oath all witnesses that shall come before them, and all testimony shall be reduced to writing and preserved as hereinafter provided."

The act further requires the commissioners to file in the office of the secretary of the interior their report, together with a map and survey showing the boundary lines of each claim, and also showing the name of each claimant, of each lot or parcel of land, the appraised value thereof, etc., including all the evidence taken by them respecting the claimants' possessory right of occupation to any portion of the reservation, and their findings in each case. They were also to issue certificates to each claimant, setting forth the amount of land that the holder is entitled to purchase and the valuation fixed thereon.

The eleventh section provides as follows:

"Section 11. That any claimant, or occupant, his heirs or legal representatives, in whose favor said commissioners have adjudicated, shall under such rules and regulations as the secretary of the interior may prescribe, have the sole right to enter and pay for, at the price fixed by said commissioners, the amount of land the commissioners have adjudged that they were entitled to purchase, at any time within twelve months next after the land officers give the public notice herein required."

Counsel for complainant have insisted in argument that the decisions of the commission are of no higher character than those of the officers of the land department, which may be set aside by a court of competent jurisdiction, on the ground of fraud, mistake, or misconstruction of the law. *Moore* v. *Robins*, 96 U. S. 530; *Shepley* v. *Cowan*, 91 U. S. 330; *Johnson* v. *Towsley*, 13 Wall. 72. But it is manifest that congress intended to clothe this tribunal with extensive judicial powers. There is a broad distinction between its functions and those of the officers of one branch of the executive department referred to. The usual powers of a court of justice were conferred upon the commission. It was to organize by electing a pre-

siding officer and to give notice of its sessions. Parties claiming the right to purchase any portion of the lands were required to appear before it. It was clothed with power to compel the attendance of witnesses and to administer oaths; and it was to "finally determine the right of each claimant or occupant to purchase the same (the land) or any portion thereof at the appraised value."

It is not to be supposed that congress created this commission and clothed it with all these powers merely for the purpose of enabling it to perform the ministerial functions usually devolving upon an officer of the land department. The language of the act and the surrounding history and circumstances alike forbid such an interpretation. It was time to have an end of controversy. For half a century the courts and legislatures of state and nation had been vexed with this dispute. The question of title had been finally settled. Congress resolved, through the commission, to have a final settlement of all questions as to improvements and the right to purchase the title. And so it was provided that the commission should "finally determine" these questions. This language, when applied to a special tribunal, must be held to mean a final determination in the absolute sense, although similar language, if applied to officers of the land department, might mean final only so far as departmental action is concerned. The rule of law above stated, relied upon by counsel for complainants, therefore does not apply. The following rule does apply: Where the law has confided to a special tribunal the authority to hear and determine certain matters, the decision of that tribunal within the scope of its authority is binding upon all parties. *Johnson* v. *Towsley*, 13 Wall. 83; *Lytle* v. *Arkansas*, 9 How. 333; *Boutner* v. *Ventress*, 8 Martin (La.), N. S. p. 644; 20 Am. Dec. 266. I am clearly of the opinion that the proceedings before the commission were in their nature judicial; that its jurisdiction, though limited and special, was plenary with respect to the particular matters specified in the act; and that its

decision upon those matters is an adjudication which cannot be attacked in the present proceeding. This conclusion disposes of the demurrer independently of the question, whether the commission erred in its decision upon questions of law. I am, however, of the opinion that the statute authorized the finding. The board evidently considered that no right to purchase could be based upon any claim or title to the lands on the part of any of the claimants, and this for the reason that such claims had been held to be unfounded by the supreme court of the United States. They were bound to assume that complainant had no title to the lands whatever, legal or equitable, and that therefore he could make no valid lease and confer no rights upon the respondents in respect to the lands. They were, no doubt, of the opinion that the fact that certain persons had claimed the title and had assumed to lease portions of the land to others, and to authorize the erection of improvements thereon upon certain terms and conditions, could not be considered, after the decision of the supreme court against such claimants. Did the law require them to recognize any claim based solely upon the fact that the claimant had assumed to be the landlord and had undertaken to lease the land? I see nothing in the statute that required such recognition. The history of the controversy shows that certain persons, including the complainant in this case, made claim to the title, and that while making such claim they executed leases upon the premises. By a decision of the supreme court their claim was found to be unfounded. Their authority to lease did not exist. They and their supposed tenants were ejected by the true owner, the United States; but not until after they had for a long time enjoyed the rents and profits.

When congress came to dispose of the land and improvements, it did not see proper to make any special provision for these original claimants. If it had been intended to recognize any claim in them, based upon or growing out of their unfounded claim of title, that intention would have found expression in words. The claimants were well known; they had

long been before congress; their cases had just been decided by the supreme court, and it was that decision which led to the passage of the act of 1877, and yet they are not named in that act. It provides certain relief for "occupants" and "claimants," and leaves the commission to finally determine who are entitled to relief under this general designation. If the commission held, as I suppose it did, that under all the circumstances and in view of the terms of the act, persons who actually made improvements at their own expense were entitled to the right to purchase, without reference to the fact that some of them had entered under leases given without authority by person claiming, but not having, an interest in the land. I think the decision was within their discretion, and I see no reason to question its perfect propriety. Because certain persons had, without authority, gone upon the land, leased it out, receiving for a series of years rents to which they were not entitled, it certainly does not necessarily follow that they were entitled to the exclusive right to purchase at the sale. Of course if these original claimants had themselves expended money in making improvements, they would have been entitled to consideration; but the fact that Rector assumed to own the land of the United States and to make a lease of it, conferred no right upon him and placed no restrictions upon the right of the United States to dispose of the lands. Congress evidently intended to authorize the commission to deal with the occupants and claimants upon the theory that no right had been acquired under the leases executed by persons having no claim upon the land.

That those persons acted in good faith in making the leases cannot alter the case. If they had in good faith made the improvements, the case would have been different. But the leases were, under the decision of the supreme court, clearly invalid. The United States was not bound to recognize them and has not done so.

The demurrer to the bill is sustained.

CALDWELL, *District Judge*, concurs.

The United States *v.* Payne.

(Western District of Arkansas. May, 1881.)

1. Homestead and Exemption Laws — To What Lands They Apply.— The fact that the title to land may be in the United States does not necessarily make it that part of the public domain which is subject to settlement by citizens of the United States under the homestead and pre-emption laws.
2. Treaty — Force and Effect of as a Conveyance of Lands.— The treaty-making power has a right to convey title to the lands of the United States without an act of congress, and if a treaty acts directly on the subject of the grant, it is equivalent to an act of congress, and the grantee has a good title.
3. Treaty-Making Power May Reserve Part of Public Domain.— The treaty-making power can reserve a part of the public domain for a specific lawful purpose, because this is but the exercise of a less higher power than that which conveys title.
4. President's Proclamation Reserving Part of Public Domain.— The president of the United States can by proclamation or executive order reserve a part of the public domain for a specific lawful purpose.
5. Power of Congress to Reserve, etc.— Congress can by law reserve a part of the public domain for such purpose.
6. Reservation — What Constitutes.— No set form of words or phrases need be used to set aside a reservation. It is enough if there are sufficient words to indicate the purpose of the power that acts, to show that it intended to act in a given case.
7. Colored Persons — Their Rights in Indian Country.— Colored persons who were never held as slaves in the Indian country, but who may have been slaves elsewhere, are like other citizens of the United States, and have no more rights in the Indian country than other citizens of the United States.
8. Treaty — How Construed.— A treaty, like an ordinary contract or a statute, must be construed to give it effect, if possible, and courts always adhere to this rule. In construing a treaty we have a right to take into consideration the situation of the parties to it at the time it was made. The property which is the subject-matter of the treaty, and the intention and purposes of the parties in making the treaty. To get at the purposes and intention of the parties, we have a right to consider the construction the parties to the treaty, and who were to be affected by it, have given it, and what has been their action under it.
9. Same.— The construction of a treaty to be taken as the true one, is the one which has been adopted and acted upon by all the parties to it, unless the parties to it were mutually led into this construction by fraud or

mistake. In a case where the mutual construction was in the face of the language used, and the rights of third parties had intervened, the language would be taken as governing.

10. SEVERANCE OF A TRACT OF LAND FROM PUBLIC DOMAIN.— A tract of land lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and no subsequent law or proclamation will be construed to embrace it or operate upon it. Although no exception is made, congress cannot be supposed to include it by a law general in its terms. This doctrine applies with more force to Indian than to military reservations.

11. INDIAN TITLE — EFFECT OF ITS EXTINCTION.— As soon as Indians part with their title the land ceases to be Indian country, without any further act of congress, *unless by the treaty by which the Indians parted with their title or by some act of congress, or some executive order of the president, a different rule was made applicable.*

This is a civil suit in the nature of an action of debt, to recover from defendant a penalty of one thousand dollars for having violated the law of the United States by being in the Indian country contrary to said law. The complaint charges that the defendant heretofore, to wit, on the fifth day of September, A. D. 1879, being in the Indian country contrary to law, was removed by the military forces of the United States, and that afterwards, to wit, on the tenth day of August, A. D. 1880, he, the said defendant, did return to said Indian country and was found therein, contrary to the form of the statute in such case made and provided. For this reason plaintiff claims an action hath accrued against the defendant.

The defendant files his amended answer, in which he denies that he owes and is indebted to the plaintiff in the sum of one thousand dollars, or any other sum in manner and form as stated in the complaint. He denies that on the third day of May, 1880, or the tenth day of August of that year, or at any other time, he was in the Indian country or any part thereof. He denies that he was at any time removed from the Indian country or any part thereof. Defendant further claims that by a treaty entered into between the United States and the Seminole tribe of Indians, on March 21, 1866, they sold to the United States a large tract of land then owned by said

tribe in the country known as the Indian territory, situated between the Canadian river and the north fork of the Canadian river, and between the ninety-seventh and ninety-eighth degrees of west longitude. That said lands have ever since been and are now the property of the United States by an absolute and perfect title in fee simple, and that they are a part of the public domain of the United States. That there is no Indian nation or tribe that has any title or right to any part of the same, or any occupancy or possession thereof. Defendant further answers that he made a settlement on section fourteen, in township eleven north, of range three west of the Indian meridian, under the pre-emption and homestead laws enacted by the congress of the United States; that said section is a part of the land so purchased and acquired by the United States from the Seminole Indians, and that it is situated within forty miles of the line of the Atlantic & Pacific Railroad, to wit, about thirty miles therefrom; that said settlement was made by him on or about the first day of May, 1880. That on the fifteenth of that month an officer of the United States army and a squad of soldiers arrested him on or near said section fourteen, and removed him from said lands and from said so-called Indian territory; that he returned to his said claim and settlement on or about the fourth day of July in said year, and was again on or about the fifteenth day of said month arrested at or near the same place by the officers and soldiers of the United States army, and forcibly expelled from said lands and from said territory.

To this answer plaintiff files a demurrer, and for cause thereof says, first, that said answer does not set up sufficient facts to constitute a defense to plaintiff's complaint; second, that defendant's said answer is otherwise defective, and wholly insufficient to constitute a defense to plaintiff's complaint, and does not entitle him to the relief prayed for.

Wm. H. H. Clayton, U. S. District Attorney, and *D. W. C. Duncan*, for plaintiff.

Thos. H. Barnes, Jas. M. Baker and *Wm. Walker*, for defendant.

PARKER, *District Judge.*—The pleadings in this case seem to raise and present to the court for decision all the points there are in the case. The complaint alleges a state of facts which if true would render the defendant liable to a penalty. See secs. 2147 and 2148, R. S. of U. S. 374. No white person has a right to go into the Indian country to reside without a permit, and if such person has once been put out and returns, he becomes liable to a penalty of a thousand dollars, to be recovered in an action like the present one. The defendant denies that he is an intruder into the Indian country. He does not stop with this denial, but proceeds in his answer to set up certain facts, but says these facts do not make him liable, but that he was an American citizen, legally and rightfully in the country.

The demurrer admits his facts, but says on them he is liable.

The question presented for decision in this case is, was the land upon which the defendant had attempted to make a settlement and the place where he was arrested the first and second time a part of or within the Indian country? If so, upon the other facts he is liable to the penalty, because he admits his arrest and expulsion from the country, and under the law the liability arises upon a second intrusion into the Indian country after having been once expelled. The defendant claims that the land purchased from the Seminoles by the United States by the treaty made with them March 21, 1866, is a part of the public lands of the United States, and as such is open to homestead and pre-emption settlement. That he made a settlement thereon under the laws of the United States relating to homestead and pre-emptions. He does not show that he has taken any of the requisite steps to give him even an inchoate homestead or pre-emption right. He could not, of course, if these lands were subject to the homestead and pre-emption laws, hold what he claims to have settled on, to wit, section 14, because under the law one person can only

homestead or pre-empt one hundred and sixty acres. Secs. 2259 and 2289, R. S. of U. S. Did he have the right to homestead or pre-empt any of the lands conveyed by the Seminole treaty of 1866?

Sec. 2258, R. S. of U. S. provides "that lands included in any *reservation* by *any treaty, law or proclamation* of the president, *for any purpose*, shall not be subject to the right of pre-emption unless otherwise specially provided by law." Sec. 2258 of the same statute provides "that every person who is the head of a family, or who has arrived at the age of twenty-one years and is a citizen of the United States, or who has filed his declaration of intention to become such as required by the naturalization laws, shall be entitled to enter one quarter section or a less quantity of *unappropriated* public lands upon which such person may have filed a pre-emption claim, or which may at the time the application is made be subject to pre-emption, at one dollar and twenty-five cents an acre." Are these lands *reserved* by any treaty, law or proclamation of the president? If so, they are not subject to pre-emption settlement.

Are they unappropriated public lands?

If they are appropriated for another purpose than homestead settlement, or if they are not subject to pre-emption, they cannot be settled upon and acquired under the homestead laws. If these lands are included in a reservation for any lawful purpose made by treaty, law or proclamation of the president, they cannot be settled upon and claimed by citizens of the United States, and the defendant would be wrongfully upon them. The lands upon which the defendant claims to have settled were originally a part of the Louisiana purchase. By such purchase the title thereto was vested in the United States. By the act of congress of May 28, 1830, the president was authorized to set apart the country now known as the Indian country or Indian territory, into certain districts for the use and occupancy of Indians to be removed there from east of the Mississippi river.

The provisions of the act of 1830 were supplemented by treaties bargaining and conveying certain tracts to certain tribes, by far the greater part of it having been conveyed to five nations, to wit: the Cherokees, Choctaws, Chickasaws, Creeks and Seminoles. These assignments were made to these tribes by the several treaties made with them, and the president, under the act of 1830, put them in possession thereof.

The lands in controversy are a part of those which were by the treaty of the fourteenth of February, 1833, made with the Creeks, set apart to them. By the treaty of the seventh of August, 1856, made between the United States and the Creeks, they conveyed these lands to the Seminoles, provided, however, that the same should not be sold or otherwise disposed of without the consent of both tribes legally given. The Seminoles, by the third article of the treaty made between them and the United States, March 21, 1866, provided as follows: "In compliance *with a desire of the United States to locate other Indians and freedmen thereon*, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek nation under the provisions of art. 1, treaty of the United States with the Creeks and Seminoles, made and concluded at Washington, D. C., August 7, 1856." This conveyance was made by the Seminoles, as is recited in the preamble to this treaty, "in view of the urgent necessity of the United States for more land in the Indian territory." The Creeks by the seventh article of the treaty of June, 1866, consented to this cession by the Seminoles.

To my mind this language used in the third article of the Seminole treaty amounts to a conveyance of the title of the land described to the United States. But the fact that the title of the land is in the United States does not necessarily make it that part of the public domain which is subject to settlement by citizens of the United States under the homestead and pre-emption laws, because those laws are explicit that any lands which have been *reserved* by any treaty, law or procla-

mation of the president are no part of the public lands of the United States subject to those laws so long as such reservation continues, and when any part of the public lands have been once lawfully reserved, that reservation cannot be set aside except by a clear and explicit act of the lawful authority, showing thereby clearly a purpose to open to settlement, by the citizen, the land reserved.

If the language of this third article of the Seminole treaty amounts to a reservation, then the lands sold by the terms of said treaty to the United States by the Seminoles, and lying in the Indian country between the Canadian and the north fork of the Canadian river, and between the ninety-seventh and ninety-eighth degrees of west longitude, and a part of which this defendant was expelled from, and to which he returned a second time, and upon which he was a second time arrested, are not such lands as persons have a right to treat as public lands and settle upon under the homestead and pre-emption laws. Did the power which made this treaty have a right to reserve this land? Most certainly. The treaty-making power has a right to convey title to the lands of the United States without an act of congress, and if a treaty acts directly on the subject of the grant, it is equivalent to an act of congress, and the grantee has a good title. *Holden* v. *Joy*, 17 Wall. 247; *United States* v. *Brooks*, 10 How. 442; *Meigs* v. *McClung*, 9 Cranch, 11. As long ago as the *Cherokee Nation* v. *Georgia*, 5 Pet. 1, and *Worcester* v. *The State of Georgia*, 6 Pet. 515, the supreme court of the United States, speaking through that most eminent of all American judges, Chief Justice John Marshall, held that a treaty with an Indian tribe was like a treaty with a foreign nation, as far as the power of the contracting parties were concerned. That it, like a treaty with a foreign power, was a law equally as sacred and equally as binding as a law of congress. Now, if the treaty-making power can convey title it can reserve a part of the public domain for a specific purpose, because this is but the exercise of a less higher power than that which conveys title. So can the president of the

United States, by an executive order, reserve a part of the public domain for a specific lawful purpose. *Wolcott* v. *Des Moines Co.* 5 Wall. 681; *Guiser* v. *McDonnell*, 6 Wall. 363. In the latter case the court says: "From an early period in the history of the government it has been the practice of the president to order lands to be reserved from sale and set apart for public purposes, and that numerous acts of congress recognize the authority of the president in this respect as competent authority." The United States court for Nevada, in the case of *United States* v. *John Leathers*, has decided the same thing. So can congress by law reserve a part of the public domain. Then we find a reservation may be made either by treaty, executive order, or by act of congress, and all of these methods are expressly recognized by the homestead and pre-emption laws. Then we find the power that made this treaty with the Seminoles had the right to reserve these lands for an Indian reservation or any public purpose. The question is, has this power done so in this case? Did the treaty-making power employ such language as to indicate its purpose to reserve the land in controversy? No set form of words or phrases is necessary to set aside a reservation. The sovereign is not parting with the title, but only setting it apart to be used for a specific public purpose. It is enough if there are sufficient words to indicate the purpose of the power that can act to show that in the given case it intended to act. Article 3 of the Seminole treaty says: "In compliance with the desire of the United States to locate other Indians and freedmen thereon," the Seminoles cede and convey, etc. And in the preamble it is recited that "in view of the urgent necessities of the United States for more lands in the Indian territory," it requires a cession by said Seminole nation of a part of its present reservation. What was this urgent necessity for more lands in the Indian territory? Certainly not to settle citizens of the United States upon, because it is a part of the open history of the times that both the legislative and executive departments of the government have constantly and all the time refused to do this, and

the executive department has at all times put forth its arm to keep citizens of the United States out of that country. Then could it have been desired by the government for settlement by the citizens of the United States under the homestead and pre-emption laws? Hardly in the face of the fact already cited, and of the further fact, that the government had given its pledges by its treaties and laws from the organization and occupation of that country by the Indians, that, with the exception of a few privileged persons, white settlers were to be kept out of that country. Those pledges remain to this day, and the government, through its executive, whose duty it is to execute them, has constantly sought to make them good. All the tribes in the Indian territory have implied or express pledges made in treaties or laws of the United States, that they are to be free from the intrusion of white persons. Whether this policy is right or wrong; whether it is a good or bad one, persons may entertain a difference of opinion. The courts did not establish it, but the law-making power did. The courts cannot change it, as they do not make the laws. It must be changed by the power that established it. Can it be presumed, in the face of these pledges, that the United States felt an urgent necessity pressing upon it for this comparatively small tract of country between the Canadian rivers, that it might open it to white settlement, surrounded as it is on all sides by Indian reservations, occupied by different tribes of Indians, except on the north, and there we find the Cherokee lands, which, by the express terms of the treaty of July 19, 1866, are to be sold and occupied by friendly Indians? Then again, we find by a treaty made with that tribe, February 27, 1867, the United States settled upon a tract thirty miles square of this identical land conveyed by the Seminole tribe, the Pottawatomie tribe of Indians. Then again, upon a part of this thirty mile tract, by an act of congress of May 23, 1872, the Absentee Shawnees have been settled, so that now there remain of this whole Seminole cession only about twenty odd townships which are not at this time actually occupied by Indians. Again, by

executive order of the president of August 10, 1869, a large portion of this country obtained from the Seminoles was assigned for temporary occupation by the Cheyennes and Arapahoes.

These acts of the government plainly indicated its purpose in agreeing to the third article of the Seminole treaty, and what it accepted these lands for. Now we must look to the acts of the government since the adoption of this treaty in order to understand its purpose. We find that in the year 1866 it entered upon the policy of settling tribes of Indians other than the five civilized tribes in the Indian country. Since that time, by treaties, laws, and executive orders of the president, it has settled upon reservations in the Indian country the Cheyennes and Arapahoes, the Kiowas, the Comanches, the Wichitas, the Pawnees, the Sac and Fox, the Nez Perces, the Poncas, the Modocs, the Kansas, the Osages, the Pottawatomies, the Absentee Shawnees, as well as some other small tribes. This explains why the treaty-making power thought on March 21, 1866, that there was an urgent necessity of the government for more lands in the Indian territory. This shows that the government had not only a desire to locate other Indians in the Indian territory, but to a great extent it has consummated that desire. It is a matter of public history that a number of these tribes which have been removed to the Indian country, taking advantage of the embarrassment of the government growing out of the war of the rebellion, had gone on the war path. The government was desirous of securing peace with them, and of settling them upon reservations where they could be civilized. It entered into treaties by which they were to be and were removed to the Indian country. Then again, the white people in other localities were pressing on other tribes, and demanding of the government their removal. To get them out of the way of the white settlements and to locate them where they would be free from intrusion by the whites, they were removed to the Indian country. 'Tis true but few of these tribes were settled on the lands in controversy, but I

cite the conduct of the government in order to arrive at its policy in regard to the Indian country, and from that policy to receive aid in the construction of the third article of the Seminole treaty. The government wanted to locate other Indians and freedmen thereon. The meaning of the United States in regard to locating other Indians thereon is plain when we consider what action it has taken since that time in regard thereto. True, congress has recently prohibited the location of certain other tribes of Indians in that country, but it has not by any law changed the general policy. It may have considered that these tribes were not proper ones to bring in contact with other Indians more civilized. What did the government mean by locating "freedmen thereon?" Let us again go back to the history of the time when this treaty was made. We find that colored people were held in slavery in all the civilized tribes of the Indian territory. Slavery was abolished there as well as elsewhere in the United States by the emancipation proclamation of the president, and by the thirteenth amendment to the constitution, adopted the thirteenth of December, 1865, and such abolition of slavery was recognized by these tribes in the several treaties made with them in 1866. The government was desirous of protecting these freedmen and of securing them homes. It was not known how well the several Indian tribes who had held them in slavery would observe their pledges to secure them the same rights they enjoyed. It was feared that prejudice growing out of their former condition as slaves and of race would be so strong against them that they would not be protected by the Indians. The government had given them the boon of freedom, and it was in duty bound to secure it, in all that the term implies, to them. The government feared that to do this it might be necessary to settle them in a colony by themselves. This purpose of the government, should it become necessary, was manifested by the terms of the Choctaw treaty of April 15, 1866. Therefore in making the treaty with the Seminoles it sought to provide a home for such freedmen as had been held in slavery by the

Indians in the Indian territory, should that necessity occur, to secure them in their rights. In the face of the surrounding condition of things at the time this treaty was made, we must conclude the government meant these freedmen who had been slaves in the Indian territory, and none others, and these could only be settled on this land by the authority of, and with the permission of the government. Colored persons who were never held as slaves in the Indian country, but who may have been slaves elsewhere, are like other citizens of the United States, and have no more right in the Indian country than other citizens of the United States. Again, if this land is open to homestead or pre-emption settlement, it has been so ever since the treaty of 1866 with the Seminoles, and yet the government has never attached it to any land district. In perfecting title under the law the settler has to take certain preliminary steps. It has been the policy of the government, when lands were open to settlement, as soon afterwards as possible to establish a new land district, or attach the lands thrown over to settlement to some district already established. It has not done so in this case, showing again how one of the parties to this treaty, which is a contract between the United States, and the Seminoles, has construed it.

A treaty, like a statute, must be construed to give it effect, if possible, and courts always adhere to this rule. In construing this treaty, we have a right to take into consideration the situation of the parties to it at the time it was made; the property which is the subject-matter of the treaty, and the intention and purposes of the parties in making the treaty. To get at this intention, we have a right to consider the construction the parties to the treaty, and who were to be affected by it, have given it, and what has been their action under it. The action of the United States which I have cited is sufficient to show its construction of the treaty. It is a matter of public notoriety that the other party to the treaty has agreed with the United States in its construction. Then we have both parties to it agreeing upon the same construction. That is the

construction to be taken as the true one, unless the parties to it were mutually led into this construction by fraud, accident or mistake. In a case where the mutual construction was in the face of the language used, and the rights of third persons had intervened, the language would be taken as governing. But in this case the right of the third person is only inchoate at best, and it comes through and under one of the contracting parties, the United States, is not yet a vested right, and is claimed with the full knowledge of the party claiming the right of the condition of this land when he set up his right.

Therefore there is no hardship on him. It must be remembered that the United States is the custodian of all the lands in the United States, whether reserved or unreserved, and it is its power and province to say by either law, treaty or executive order of the president when these lands are open to settlement by the citizen. Has it said that these lands in controversy, by the third article of the Seminole treaty, are so open to settlement? The reservation of lands for any specific purpose by the government, if expressed in the most accurate, concise and precise form of words, is but an expression of a desire of the government to use them for that purpose. It does not part with its title by reserving them, but simply gives notice to all the world that it desires them for a certain purpose; therefore the same precision and accuracy is not required as in case of a conveyance. Does not the government express its desire by the language of this treaty? The language is, "In compliance with a *desire of the United States to locate other Indians and freedmen thereon*," the Indians convey, etc. There is an expression of all that could be done by the most formal instrument, to wit: the desire or purpose of the government. The government for fifteen years, judging from its action, thought it had given expression to its desire sufficiently plain to reserve these lands. The Indians have thought so too, and so I think. I am of the opinion that it is sufficient to set aside the land now in controversy for the purpose expressed in this third article of the treaty. But it is claimed in this case that this

land is open to settlement, by virtue of the sixth section of an act of congress, approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas." That section is as follows: "That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and the act entitled an act to secure homesteads to actual settlers on the public domain, approved May 20, 1862, shall be and the same are hereby extended *to all other lands* on the line of said road when surveyed, excepting those hereby granted to said company." It is further claimed that this grant of lands to this railroad company applies to lands in the Indian country. The executive department of the government decided, through the commissioner of the general land office, October 13, 1877, in the following language, that it did not: "But in addition (he says), I think the demand cannot be complied with, for the reason that the company has no grant of lands in the Indian territory. That without entering upon the question of the intent of congress to make a present grant of such lands, which I do not understand the company to claim, an ultimate grant, even, was not contemplated by the act, except such grant might be acquired from the Indians by the company." Whether this is so or not I do not decide, because it is not necessary in this case. It must be remembered that this treaty with the Seminoles was prior to the act of congress just cited. The first was adopted March 21, 1866, and the latter July 25, 1866.

It is a principle of the law declared by the supreme court of the United States in *Wilcox* v. *Jackson*, 13 Pet. 266,

that "whenever a tract of land has been appropriated to the public use, it is severed from the mass of the public domain, and subsequent laws of sale are not construed to embrace it, though they do not in terms except it." Again, the supreme court in *The Leavenworth, Lawrence & Galveston Road* v. *United States*, 2 Otto, 733, affirm the doctrine in *Wilcox* v. *Jackson*, "that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception is made of it." "This doctrine," says the court, "applies with more force to Indian than to military reservations." And again it says, "congress cannot be supposed to include them by a subsequent law, general in terms." If this land in controversy was by the third article of the Seminole treaty reserved for Indian settlement by competent authority, then it was an Indian reservation as much as if it was actually occupied by Indians by authority of the government, it having been reserved prior to the passage of the railroad grant and charter. This law being general in its terms, not making any special reference to these lands, cannot be held to embrace them, although it declares that all other lands except those granted to the railroad are open to settlement. I think these cases are conclusive on this point. But again, suppose we take the language of the section and undertake to apply the pre-emption law of 1841 and the homestead law of 1862 "to all other lands," and to what conclusion must we come? If we apply these laws we must apply the whole of them, and in such application we find that these laws did not apply to any lands reserved by treaty, law of congress, or proclamation of the president. These lands being reserved, they did not apply to them any more than the homestead and pre-emption laws now in force apply to them, and the words "all other lands on the line of said road," must under the law be construed to mean all other lands not reserved by treaty, law of congress or proclamation of the president. I think, therefore, from the authorities

I have cited and from the language of this section, that there is no doubt that this act of congress has not changed the lands in controversy from the condition of a reservation. They being in that condition, they can only be taken out of it by clear and specific language expressive of the will of the power which under the law can restore them to the public domain, subject to homestead and pre-emption settlement by the citizen.

One other point is necessary to be decided in this case, and that is, whether these lands, although they may be reserved, are a part of the Indian country, because lands may be reserved and yet not be a part of the Indian country. The government can and does reserve lands for a variety of purposes other than Indian reservations — for forts, arsenals, dock and navy yards, national parks, etc.— and because they may be reserved they do not necessarily become a part of the Indian country. It is necessary they should be a part of such country, in this case, to make the defendant liable to the penalty sued for, because, although these lands may be reserved from settlement, and the defendant would have no right to settle on them, and could be by competent authority ejected from them, yet to make him liable under this statute he must have intruded into the Indian country, been put out once, and returned thereto a second time. The defendant was the first and second time arrested upon lands which were originally the lands of the Creeks. They were defined by treaty with them, and when owned by them were clearly and unmistakably Indian country. By treaty of the seventh of August, 1856, the Creeks conveyed these lands to the Seminoles. They were taken possession of and occupied by the Seminoles until they were conveyed to the United States. They were most certainly a part of the Indian country all this time. They are within what is well known and recognized by the government of the United States as the exterior boundaries of what is called and known as the Indian country. These boundaries have been established by acts of congress, treaties and proclamations of the president. The case of *The American Fur Company* v.

United States, 2 Pet. 137, decides "that a country which has been purchased of the Indians, and which is not included within the boundary line defining the Indian country, ceases to be Indian country." This is undoubtedly true. But it does not decide that a country purchased from the Indians *ipso facto* ceases to be Indian country.

It may be within the exterior boundaries of their country over which the laws of the United States for the government of the Indian country extend, or there may be some law or treaty or executive order under which it still continues to be Indian country, as in the case of the *United States* v. *Forty-three Gallons of Whisky*, 3 Otto, 188.

The case of *Bates* v. *Clark*, 5 Otto, 204, decides that as soon as Indians part with their title the land ceases to be Indian country without any further act of congress, *unless by the treaty by which the Indians parted with their title or by some act of congress a different rule was made applicable to the case.* I think it clear in this case that by the terms of the Seminole treaty a different rule was made applicable, and this view of the case is strengthened when we consider the purpose for which the government purchased it; the fact that it is surrounded on all sides by other Indian reservations, and the further fact that it is within the exterior boundaries of what is now and what has been for over a quarter of a century known and recognized by the government of the United States, by the surrounding states, and by the public generally, as *the Indian country.*

The moment the government purchased the land, and by the same act simultaneous with such purchase, it reserved it for a specific purpose. That purpose was the same as the one for which the land had been used for thirty-three years, ever since the Creek treaty of the 14th of February, 1833.

It was Indian country beyond question while the Creeks and Seminoles occupied it. The government obtained it for Indian occupancy. Of course it could not at the same moment make the treaty and transplant other tribes on the land, but

we find it commenced to do so as soon thereafter as possible. It has gone on and treated it as devoted to that purpose, by settling, on a large portion of it, Indian tribes. It cannot be presumed that for fifteen years the government has had a tract of country within the very heart of the Indian country which it purchased, and has permitted to remain in such condition as it might become a place of refuge for criminals and outlaws who could depredate and prey upon their Indian neighbors and others with immunity from punishment, especially when the government has pledged protection and security from intruders to all the tribes in the Indian country. Yet this is so if this is not Indian country, because the laws of the United States would not extend over it, and it would not be within the jurisdiction of any state or territory. It never intended this. It did not by its treaty of purchase with the Seminoles do it. By its act of reservation of this country, situated as it was and being reserved for the purpose it was, it continued still to be Indian country as much as if it had been at that time entirely occupied by Indians. Now in the estimation of many persons it may be desirable to open this country to settlement. If so, it must be done by the power that has a right under the constitution and laws of the country to do it. It must not be asked or expected that to accomplish this end the courts will break or even bend the timbers of the law, especially when that power in the government which could act, has time and again refused to act. The courts do not make the laws. They interpret, construe and execute them as they find them.

From my views of the law as applicable to this case, upon the facts set up by the defendant, he is liable for the penalty under the law, and the demurrer to the answer must be sustained.

It is so ordered.

THE MOLINE WAGON COMPANY *v.* RUMMELL *et al.*

(Western Division of the Western District of Missouri. October, 1880.)

1. PARTNERSHIP — DEBTS OF FIRM.— Where two individuals, composing a partnership, divide the stock between them and carry on separate establishments in the firm name, and either of them purchase goods on credit in the firm name, in the absence of any personal or public notice to the creditor that the firm is dissolved, either or both partners may be held liable for the debt.
2. PUBLIC RUMOR OF DISSOLUTION — CREDITORS who extend credit to the firm are not bound to regard public rumors of dissolution if the partners continue to use the partnership name and avail themselves of the partnership credit.
3. MORTGAGE BY ONE PARTNER OF STOCK UNDER HIS CONTROL.— If a partnership still existed, notwithstanding the division of assets, one partner could not give a mortgage of the stock under his control to secure individual debts which he may have created. Such a mortgage would be a fraud on the partnership creditor.
4. OBJECT OF MORTGAGE.— Whether the partnership is dissolved or not, if the object of the mortgage was to prevent, hinder or delay the firm creditors from collecting their debts, and the mortgagee knew this fact, the mortgage is void under the facts in this case.

KREKEL, *District Judge*, charged the jury as follows:

The Moline Wagon Company, on the eighth day of January, 1880, instituted suit in the Putnam county circuit court of this state, against Rummell & Cutler, claiming that these two defendants constituted the firm of Rummell & Son. The suit is on four notes and on an account, all given and made in the years 1879 and 1880, and amounting in the aggregate to near seven thousand dollars. The suit came here by removal under various acts of congress authorizing non-residents to bring or remove their suits into the federal courts. In aid of their suit plaintiffs made affidavit alleging that they had good reason to believe and did believe that the defendants had fraudulently conveyed and assigned their property or effects so as to hinder and delay their creditors. One of the defendants, Jacob Rummell, files a plea in abatement denying the allegations of the affidavit, and the plaintiff is thereupon held to prove the

existence of the facts sworn to by him. The plaintiff, the Moline Wagon Company, undertakes to establish the truth of the allegations, and present their claim against Rummell & Cutler, claiming that they composed the firm of Rummell & Son, to whom the property was sold, and who obtained credit. Cutler, by failing to appear and deny the allegations in the affidavit, confesses them. It is claimed by defendant Rummell that the debt is due from Cutler alone; that the property was sold to him, and that he, Cutler, alone is responsible. If you shall find from the testimony that the property was sold by the Moline Wagon Company to Cutler alone and not to the firm of Rummell & Son, you should find the issue for the defendant Rummell; for unless the firm existed, the Moline Wagon Company cannot attack any of Rummell's acts or intentions in making the mortgage. It is only upon the supposition that Rummell is liable with Cutler for the debt to the Moline Wagon Company that it has the right to inquire into the acts and doings of Rummell in dealing with what he claims to be his property. The question of the existence or non-existence of the partnership is therefore a material question.

It is not disputed that up to 1878 a partnership between Rummell & Cutler did exist; that that partnership dealt in general merchandise, including wagons, and that dealings were had between the plaintiff corporation, the Moline Wagon Company, and the firm of Rummell & Son. It is also an undisputed fact that the firm of Rummell & Son, composed of Rummell & Cutler, were equal partners up to 1878. Persons or corporations dealing with a partnership once existing have a right to presume, and the law will presume, that the persons once composing the firm continue doing business in the firm name, the firm continues to exist, and nothing short of public or personal notice that the firm has been dissolved will relieve the parties of their liability as partners. No agreement or understanding between the partners, no division of their business, can relieve either of his legal liability as to creditors who

extend credit to the firm. Nor are creditors who extend credit to a firm bound to regard public rumors, even if they heard of them, if the partners continue to use the partnership name and avail themselves of the partnership credit and accept such credit. You are therefore instructed that if you shall find from the evidence that a partnership between Rummell & Cutler existed up to 1878, that thereafter and up to the time of the creation of the debts sued on by the Moline Wagon Company the partners of such firm continued to obtain and receive credit in the firm name, either or both of the partners are liable for the debts thus created, unless public notice of the dissolution of the partnership or the notice of dissolution is brought to the notice of the Moline Wagon Company. If, under this view of the law, you shall find from the evidence that plaintiff, the Moline Wagon Company, gave credit to the firm of Rummell & Son, composed of Rummell and Cutler, and the firm existed, it is liable for the debt thus contracted.

All the assets of the partnership, both merchandise, notes and accounts, as well as all wages and property of the partnership which Cutler may have handled in his division of the partnership, as well as all notes and accounts which Cutler may have taken, together with all property of the partners, in case of insufficiency of partnership assets, are liable for debts created by the partnership. If you shall find from the evidence that a partnership, under the instructions given you, existed between Rummell & Cutler at the time of the execution of the mortgage by Rummell, then (for the purposes of this case) Rummell could not use the partnership assets for payment of individual debts which Rummell may have created, and the mortgage is a fraud upon the partnership creditors.

In order to arrive at the intention of Rummell in making the mortgage, your attention is directed to the mortgage itself. By its terms it is a conveyance of "the entire stock of merchandise of Jacob Rummell, * * * and all the notes and accounts of said Rummell due or to become due." Now the stock of merchandise might be seen, but no one looking at the

mortgage could tell the notes and accounts conveyed. You are to arrive at a conclusion as to what object Rummell could have had in view in thus keeping out of the mortgage the amount of the notes, which must have been known to him. Again, you will determine from the evidence what was the object of Rummell in making the $1,500 note to Huiscamp, when he could have named the Keokuk creditors as well as all others in the mortgage, which, if done, would in all probability have disclosed the claimed mistake of $900 in the sum ($1,500) assumed to be due the Keokuk creditors. Had Rummell any object in placing these creditors under the care of Huiscamp as was done, and what was that object? Your attention is also directed to the amount of debts which Rummell claims to have had at the time he made the mortgage. After ascertaining this amount, you will further see what amount of property he had. If by comparing the amount of indebtedness with the amount of property which he owned, you shall find that the indebtedness was not as large as the amount of property, you will have to determine what intention Rummell could have had in making the conveyance. You will recall the arrangement between Huiscamp and Rummell, agreeing to delay the execution of the mortgage until something occurred making the execution of the mortgage desirable. Regarding the acts of Rummell and Huiscamp in dealing with the stock of goods, notes and accounts, after the mortgage was executed, you are instructed that while the acts of the parties do not authorize the court to declare the mortgage void as a matter of law, yet you should closely look into what they did, and especially the act of Huiscamp in selling goods at retail when the mortgage provided for a public sale. Thus you may arrive at the intention of the parties by their acts. You will determine from the evidence whether the release of the notes from the mortgage was an afterthought, and whether thereby and the distribution of the notes among the creditors, Rummell intended to cover up and give color to a transaction not originally intended.

The large amount of property conveyed by the mortgage to secure a comparatively small debt is not itself a fraud, but such an act of conveying all his stock in trade, in face of the indisputable fact that he had sufficient notes and accounts by which he could have secured Huiscamp without making the mortgage, deserves your closest scrutiny for the purpose of arriving at the intention of Rummell in making the mortgage. If the mortgage was made by Rummell in order to prevent, hinder or delay the creditors of Rummell & Son from collecting their debts, you should find the issue for the plaintiff. It was not for Rummell to determine that the firm of Rummell & Son did not owe the Moline Wagon Company, and therefore take steps to prevent, hinder and delay them in the collection of their debt, if they had any against the firm; and if you shall find from the evidence that the object of the mortgage was to prevent, hinder or delay them in the collection of any claim they might have against the firm, the law declares such acts fraudulent. In this case you may well see whether the maxim, "acts speak louder than words," applies. As a matter of course, the explanation given by the parties of and about their acts is to be considered by you in the examination of the testimony. With the troubles between the partners we have nothing whatever to do; and such testimony in relation thereto as was allowed to be given, was for the purpose only that you might be the better able to judge of the weight to be given to the testimony of Rummell and Cutler.

Larwell *v.* Stevens.

(Western Division of the Western District of Missouri. October, 1880.)

1. Title by Limitation—Adverse Possession.—If a possession of real estate is held by mere indulgence, or by consent of the owner, and the person in possession understands this, the possession is not adverse and cannot ripen into a title which will defeat the right of the legal owner.

2. SAME — EXCLUSIVE POSSESSION. — If at any time within ten years the legal owner and the claimant by possession have had joint possession of the premises, such a possession cannot establish a limitation against the title of the real owner.
3. SAME — INTENT TO ACQUIRE ADVERSE POSSESSION. — The intention to acquire title by adverse possession must be entertained at the time the ten years' limitation commences to run.

KREKEL, *District Judge*, charged the jury as follows:

The plaintiff, Larwell, brings this action to recover the possession of real estate in Kansas City on which the defendant Stevens resides. To make out his case he presents sundry conveyances embracing the property in controversy. The objection raised on the introduction of these title papers having been overruled, it may be taken that they tend to show title in plaintiff, and if the deeds are found to be genuine, vest the title in the plaintiff. To defeat the title of plaintiff, the defendant pleads the statute of limitations; that is, he says he has been ten years at least in the actual, continuous, *exclusive* and visible possession of the property sued for, and has thereby acquired such a right as will defeat the plaintiff's action. In the first place it is proper to call your attention to the fact that the *defendant* must establish the fact of the possession claimed. The possession must also be adverse, that is, in hostility to the title of the real owner; for if the possession is held by mere indulgence and by consent of the owner, and the defendant understood this and acquiesced, the possession is not adverse. A possession while so held cannot ripen into a title which will defeat the true owner of his right, because it is not adverse and hostile. As already stated, the possession, in order to avail the defendant, must be an exclusive possession; that is, he must not have held it within ten years prior to the commencement of the suit in conjunction with one who was the real owner of it. If the real owner and the claimant of the possession within ten years prior to the bringing of the suit had joint possession of the premises sued for, such a possession will not avail this defendant. The possession follows the title, and if the owner and others are in possession, the law considers the

owner to have the possession. If you shall find from the evidence that this defendant was, at any time within ten years prior to the bringing of this suit, in joint possession with his son, and that the son was the owner, and claimed title to the property in controversy to the knowledge of the defendant Stevens, then the plea is not good. The plea of the statute of limitations for the possession must be exclusive and not joint with one having the title to the property of which they are in joint possession. If you find from the testimony that the title to the property in controversy was held by any one within ten years prior to the bringing of this action, with the intention and for the purpose of giving a home to the defendant, and the defendant knew and consented thereto, such holding is not adverse, and is not in hostility to the title of the owner, and the statute of limitations will not avail the defendant. A title by the statute of limitations may be said to be the continued accretion of time from day to day until ten years are complete. During all this time the defendant must have been in open, notorious, visible and exclusive possession of the premises. In order to determine whether the possession was an adverse possession — that is, whether the defendant claimed title in himself,—you will examine all the acts, doings and sayings of the defendant pertaining to the possession of the premises. Thus the act of defendant in writing the deed of trust or mortgage by which the title to the premises in controversy was to be affected, is to be examined by you for the purpose of determining whether the defendant's possession was not in harmony rather than in hostility to the title of the owner. The non-payment of the taxes for a great length of time and the reason given for not making such payment, and the failure to pay or offer to pay any part of the taxes after they had been paid, if such failure occurred, insurance and dealing with the loss recovered, will all be carefully examined by you in order to determine the nature of the possession held by Stevens, and whether the same was adverse and in hostility to the title of the owner, or in harmony with it.

While the title, growing up under the statute of limitations during the ten years, becomes available to Stevens, if such possession is in hostility and not in harmony with the title of the owner, you may closely look at sayings and doings of the party who seeks to deprive the true owner of his right by mere possession in order to learn his intention. If such sayings and doings tend to nurse the young and growing title, you may arrive at a conclusion favorable to the defendant. But if any of these sayings and doings tend in the opposite direction, and indicate that the acquiring of a title by possession was not in the mind of the possessor, we may justly and properly arrive at an opposite conclusion, and adverse to the claim set up. You will thus go over the whole of the testimony, and present your conclusions in your verdict. If you find for the plaintiff, you will say in your verdict what the amount of damages are from the day of the bringing of the suit up to the time of rendering your verdict. These damages consist of the value of the property by way of rents during the time the possession has been withheld. You will also find and state in your verdict what is the monthly value of the premises. If you find for the defendant, you will so state in your verdict.

The jury returned a verdict for the plaintiff.

HUNTOON *et al. v.* TRUMBULL *et al.*

(Western Division of the Western District of Missouri. October, 1880.)

1. EXHIBITION OF NEW INVENTIONS.— New inventions in machinery are not prohibited from being shown in proper places, in proper condition and at proper times, because either men or animals may become frightened at the unusual sight.
2. SAME — PROPER CARE.— The usual place of keeping machinery of new or unusual character may be considered by the jury as bearing on the question of proper care.
3. CAUSE OF RUNAWAY.— In an action for damages caused by a runaway horse, if the jury are satisfied from the evidence that the horse was dangerous in the sense of being disposed to run away, that fact may be considered with the other testimony in arriving at the cause of the runaway.

4. KNOWLEDGE OF HORSE'S CHARACTER.— The knowledge of the husband (who is the driver), concerning the disposition of the horse, is the knowledge of the wife.
5. ACCIDENT CAUSED BY VICIOUS HORSE.— If neither the husband nor wife knew the vicious character of the horse, yet if the jury are satisfied from the evidence that the horse was vicious, and that being so, caused or actually contributed to the running away and consequent injury, they must find for the defendants.

KREKEL, *District Judge*, charged the jury as follows:

The evidence in this case shows that the firm of Trumbull, Reynolds & Allen were on the fourth day of July, 1879, trading in agricultural machinery, having their place of business on the east side of Walnut, between Fourth and Fifth streets, in Kansas City; that for a number of years, in the course of their business, they had placed and kept standing on the opposite side of the street from their stores a number of machines, among them separators and a traction engine; that on said fourth day of July they took out a traction engine from Kansas City to the fair grounds for exhibition. When the engine was taken back in the early part of the afternoon of the fourth, it was left on the opposite side of the street from their store, in a gutter or ditch designating the limit of the street, the evidence showing the place and manner in which it was left. Huntoon and wife (the plaintiffs), residents of Wyandotte, Kansas, on the said fourth of July came with their family to Kansas City, Mr. Huntoon, wife and child riding in a buggy and the two boys in a street car. While going up Main street they saw the traction engine on Walnut street. After going up Main street, they crossed over into Walnut, passed up Walnut some distance, turned and came back or down Walnut street, one of the boys walking, while the other two children were with their father and mother riding in the buggy. They thus proceeded down Walnut street, and somewhere near Fifth or south of Fifth the horse ran away, upset the buggy and threw out the occupants, and it is claimed Mrs. Huntoon was permanently injured by the fall. The first and most important question you are called upon to decide, under the state of facts

in evidence, is, was this act of defendants', in placing the separators and the engine in the condition the evidence shows the same to have been, a wrongful and negligent act, and whether in consequence of this claimed wrong and neglect the injury complained of resulted to plaintiff? If the act of the defendants was not wrongful and negligent the defendants are not liable. But not only must the act of leaving the machinery as shown by the evidence be wrongful and negligent, but such wrong and neglect must have been the cause of the injury complained of. If the injury to plaintiff was not caused by the wrongful and negligent acts of defendants, plaintiff cannot recover in this action. In order to arrive at a proper conclusion as to whether the leaving of the separators and the engine as they were left, were wrongful and negligent acts on the part of the defendants, you will, in the first place, consider the machinery so left, its appearance as well as the necessity, if any, of exhibiting such machinery in the usual course of trade as the means of examination. Not every new invention in machinery is prohibited from being shown in proper places, in proper condition and at proper times, because either men or animals may become frightened at the unusual sight. The question for you to determine is, were the separators and engine kept in a proper place where they were kept, and was the engine kept as prudence and due regard for safety of life and property would dictate it to be kept? In order to determine this, you may take into consideration the manner and place in which machinery of the kind referred to had been kept by defendants in the past — the fact that no regulation, so far as shown, prohibits such keeping in Kansas City in the places where the same were kept. Not that such want of regulation justifies any wrongful and negligent keeping, but as bearing upon the general question of proper care.

Separators and traction engines had become articles of common use, and properly kept cannot be complained of because a horse may become frightened on account of them.

If upon full consideration of the evidence in this case you

shall come to the conclusion that no wrongful action, negligence, was committed by defendants, in keeping the separator and engine in the place where the same were kept, and in the manner in which they were kept as shown by the evidence, you should find for the defendants. But in case you shall not find this issue for the defendants, but find that they committed a wrong, and are guilty of neglect in having kept the machinery in the place and in the manner in which the same were kept, then you should determine whether the wrongful and negligent act of the defendants caused the injury by the plaintiff complained of. All the testimony bearing on this question should be examined by you, and in so doing you should carefully consider as to whether a horse is likely to become frightened at objects such as the machines described by the testimony. You should be satisfied from the testimony that the horse became frightened at the machines, smoke or steam issuing from the engine, if any, and at nothing else, and that such fright caused the running away. You should also be satisfied from the evidence that the horse was managed with ordinary care and prudence. That the individual managing him had not deprived himself by his own acts from a proper management of the horse. And here you may take into consideration, in connection with the rest of the testimony, the fact that four persons were in the buggy at the time the accident occurred. Regarding the character of the horse, you are instructed that if you are satisfied from the evidence that he was dangerous in the sense of being disposed to run away, that fact must be considered with the rest of the testimony in arriving at the cause of the runaway. The knowledge regarding the disposition of the horse by Mr. Huntoon is the knowledge of the wife. If the plaintiff Huntoon or his wife knew nothing of the vicious character of the horse, and yet you are satisfied from the testimony that the horse was vicious, and that being so, caused or actually contributed to the runaway and consequent injury, you should find for the defendants. The defendants cannot be charged with the consequences of the

wrongful act in allowing an unsafe horse to be hitched up, for that would be making them liable for the wrongful act of another. There may be a responsibility in such case, but that responsibility is not upon the defendants. A livery man is bound to keep safe horses or fully disclose the character of the horse to the driver at the time of letting him, and he may be responsible for wrongful acts in this particular.

As already stated, you are to consider the character of the horse as shown by the evidence along with the rest of the testimony in order to arrive at the cause, or which contributed to the runaway and accident. The suit is for permanent injury to the wife. The loss of service of the wife, the nursing and expense of nursing, and the doctors' bills, are subjects of another suit brought by the husband on his own account, and you have nothing to do with damages which may have thus arisen. It is the permanent injury to the wife which is in controversy. If such has resulted from the wrongful act of the defendants, and from no other cause, and the plaintiffs have not contributed by their own acts or neglect or caused by the character of the horse, you are to find for the plaintiff, and estimate her damages, if any.

Farmers' Loan & Trust Company *v.* The Central Railroad of Iowa.

(District of Iowa. May, 1881.)

1. Receiver of Railroad — Compensation.— A salary of $3.000 per annum is inadequate compensation for a receiver who is called upon to manage the repairs, preservation and operation of a long line of railroad, and who disburses in the period of twenty-seven and one-half months the large sum of $1,700,000, and gives bond in the sum of $50,000.
2. Same — Same — Agreement to Serve for a Given Sum.— Nevertheless if a person agrees to serve as receiver for $3,000 per annum, and enters upon duty under an appointment fixing his salary at that sum, a court of equity will not release him from that agreement and add to his compensation unless it be shown that his duties proved to be more arduous than he

or the court expected, or that he performed duties in addition to those ordinarily required of a receiver.

3. SAME — SAME — EXTRAORDINARY SERVICES. — It is the duty of a receiver to discharge the proper duties of his office with fidelity and economy, and in such manner as to save money to the company, if by reasonable diligence this may be done, and he is not entitled to an increase of compensation for having done so. *Held*, therefore, that a receiver was not entitled to extra pay for uniting the offices of auditor and cashier, thus saving one salary; nor for the disbursement of money in payment of debts contracted by his predecessor, and the like.
4. SAME — SAME — SAME. — A receiver may be allowed extra compensation for extra and unexpected labor performed in furnishing, upon the order of the court, reports and statements of accounts to be used in the course of a litigation; also for extra work and travel beyond office hours and at night; also for performing in person the duties of superintendent in addition to those of his office proper; also for attending personally, as an attorney, to the trial of causes in court, in so far as thereby attorneys' fees were saved to the company.
5. SAME — FORFEITURE OF COMPENSATION BY FRAUD OR MISCONDUCT. — To deprive a receiver of all compensation on account of fraud or misconduct, it must appear that his action has been willfully corrupt. An error of judgment is not enough.

In the matter of the application of J. B. Grinnell, late receiver, for additional compensation for services.

The facts are stated in the opinion. The hearing was had before McCrary and Nelson, JJ.

C. C. Cole, for complainant.

Brown and *Hagerman*, *McCrary & Hagerman*, for the receiver.

MCCRARY, *Circuit Judge*. — J. B. Grinnell, petitioner, was appointed by this court receiver of the Central Railroad of Iowa, on or about the fifteenth day of January, 1876, to succeed one D. N. Pickering, and his compensation was fixed by the order of appointment at $3,000 per annum.

Accompanying the order of appointment were instructions in writing from the circuit judge (Hon. John F. Dillon), which among other things directed as follows:

"It is not expected that you will serve as superintendent.

"You will continue the present superintendent or employ another, as your judgment dictates, on the best terms that will secure a good man."

The petitioner served as receiver during a period of two years and three and one-half months. From January 1, 1876, until May 1, 1877, he had no general superintendent, and performed during that period of fifteen months the duties of a general superintendent in addition to those of the receivership.

By petitioner's direction the duties of the offices of auditor and cashier were united in one person, whereby a saving to the company of about $100 per month was effected.

The petitioner upon entering upon his duties reduced the salaries of all officers and employees under him ten per cent.

The company had an attorney employed at $60 per month salary and $20 per day additional when actually employed in court.

The petitioner attended in person to some of the legal business of the company, being engaged in this way for about thirty days.

In the disbursement of the revenues of the road during his administration, petitioner applied to the payment of debts contracted by his predecessor during his receivership, the sum of $280,000. After petitioner's appointment the court and parties interested in the main suit required frequent statements and reports of the accounts in the general office of the road, which called for a greater amount of time and labor on the part of petitioner than would be required ordinarily at the hands of a receiver.

During petitioner's service his general health and eye-sight became much impaired, and it appears that in the discharge of his duties the petitioner was frequently called to travel on the train and to break his rest at night.

The master finds the foregoing facts, and also reports that petitioner had effected a saving in the expenses, under various heads, in his operation of the road compared with the similar

expenses of his predecessor, of $85,000, in about eighteen months.

On the part of complainant the master finds that there is still a large balance unsettled on the final account of petitioner as receiver. This balance consists of three items:

1. An item of $4,000, expended by the receiver to purchase for the benefit of the company a half interest in an uncompleted railroad, known as the "Farmers' Union Railroad," and this without application to, or order or approval of this court.

2. An item of $1,177.90, being a note of the "Iowa Terra Cotta and Fire Clay Company," received in payment of freights due the company as cash and credited to the receiver in his accounts as such. This note cannot be collected and is therefore by the master charged back to the receiver.

3. An item of about $190, growing out of a contract for water supply at Grinnell. The petitioner paid $400 in advance to certain parties, who agreed to furnish such water supply, but failed to keep their contract. Whereupon petitioner paid back to the present receiver the sum of $210, leaving the above balance unsettled.

Upon these facts Mr. Grinnell petitions the court to increase his compensation to $5,000 per annum.

This is asked more specifically upon the grounds following, to wit:

1. For performing double service as receiver and general superintendent for a period of fifteen months. For this the sum of $2,500 is claimed.

2. For saving effected by joining the offices of auditor and cashier. For this $1,340 is claimed.

3. On account of duties and responsibilities not anticipated in accepting the office, growing out of debts amounting to $280,000, previously contracted. On this sum one-half of one per cent. is claimed, amounting to $1,400.

The allowance is further urged upon the ground of extra labor, care and responsibility occasioned by the bad condition

of the road, the necessity for new work and extraordinary expenditures.

The complainant, in its answer to the receiver's petition, insists:

1. That the receiver had no right under the order of the court to unite the offices of receiver and superintendent.

2. That the petitioner was bound to perform the duties performed by him, if at all, without extra compensation.

3. It was petitioner's duty to disburse the money in payment of debts contracted by his predecessor.

4. The trusts and responsibilities imposed upon the petitioner were such only as usually attend upon such avocations.

The answer further set forth the facts in relation to the three unsettled items in the account of the petitioner as receiver, above mentioned, and avers that said payments were unauthorized, and said Grinnell should account to this court for and pay over the amount of said items to his successor, and should be "disallowed any additional compensation for any cause or under any pretext."

It is further insisted in argument, but not set forth in any pleading, that the petitioner's claims should be rejected on account of certain transactions by him as receiver, which will be particularly stated hereafter. We will briefly consider two questions:

1. Whether, assuming that the receiver has faithfully administered his trust without intentional error or fraud on his part, he is entitled to an additional allowance, and if so, how much?

2. Whether by his conduct in office he has justly forfeited any claim to such additional allowance?

We are clearly of the opinion that the salary originally fixed was inadequate, considering the nature of the duties and responsibilities it devolved upon the receiver, who was called upon to manage the repair, preservation and operation of a long line of railroad, and to disburse in a period of twenty-

seven and one-half months the large sum of $1,700,000, and who was required to give bond in the sum of $50,000. Mr. Grinnell's predecessor received $5,000 per annum, and it is a well-known fact that a much larger compensation is frequently paid for such services. Nevertheless the petitioner agreed to serve for $3,000 per annum, and we know of no sufficient reason for releasing him from that agreement and adding to his compensation, unless such reason can be found in the fact that his duties proved to be more arduous than he or the court expected, or that he performed duties for the company in addition to those ordinarily required of a receiver.

Some of the specific claims of petitioner cannot be allowed, because they are based not upon the performance of extra or unexpected duties, but upon the ground that he discharged the proper duties of his office with fidelity and economy, and in such a manner as to save money to the company. Of this character is the claim for an allowance on account of the uniting by order of petitioner of the offices of auditor and cashier; also the disbursement of money in payment of debts due before his appointment and some others of a similar character.

However praiseworthy the petitioner's conduct may have been in respect of these matters, he did no more than his duty — no more than was required of him by his contract. It does appear, however, from the master's report, and from the record of the long and bitter contest in the foreclosure suit, that demands were made upon the receiver for reports and statements of accounts in the general office, requiring a greater amount of time and labor on the part of petitioner than was anticipated at the time of his appointment.

We think also that it sufficiently appears that the condition of the road and the state of the litigation concerning it devolved some extra duty upon the receiver and some work and travel at night, and outside of the usual hours of labor.

For this extra service we think him fairly entitled to an allowance of fifteen hundred dollars ($1,500).

It is conceded that during a period of fifteen months peti-

tioner discharged the duties of receiver and superintendent and thus saved the salary of one official. It is clear that this was extra service — not contemplated by the original order of appointment.

It is also clear that the sum claimed, $2,500, for this extra duty, is less than would have been required to pay the salary of a competent superintendent. But it is insisted that the receiver violated his instructions by performing the duties of the general superintendent. We do not think so. True he was not *expected* to serve as superintendent, and he was instructed generally to continue the superintendent then employed, or employ another, in his discretion; but a fair construction of the order does not warrant the conclusion that the court intended to prohibit him from discharging the duties of superintendent in addition to those of the receivership. From the whole tenor of the letter of instructions it is evident that the court intended to, and did give the receiver a large discretion in the administration of the affairs of the company. We think the sum claimed under this head should be allowed. We think also that the claim for services as attorney for the company should be allowed, in so far as by such service the receiver saved the company expense.

Upon looking into the report of the master and the evidence, we conclude that Mr. Grinnell, by the service rendered as attorney, saved the payment by the company of at least twenty days' service in court of the regular attorney of the company at $20 per day. We therefore allow this item, as claimed, in the sum of $390.

"A receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expense he may have been put to in the performance of his duties or in bringing actions or defending legal proceedings which have been brought against him." Kerr on Receivers, 219.

All this, however, is upon the assumption that the receiver has been guilty of no such fraudulent conduct as ought to forfeit his right to compensation. We have already called atten-

tion to three items in the account of the receiver which have been rejected by the master as unauthorized, and to the clause in the answer wherein it is alleged that by reason of these the receiver should not be allowed extra compensation. Concerning these items it is sufficient to say that they have never been allowed to the receiver; that they stand charged against him to be accounted for on final settlement, and that there is no proof upon which it can be maintained that any fraud was intended by him with respect to either of them. All that he did was perfectly consistent with an honest belief on his part that he was acting within his authority and for the best interests of the company. But our attention is invited to certain other items in the receiver's accounts, which have been passed by the master and which are now charged in argument — but not in the answer — as fraudulent and of such a character as to deprive petitioner of extra compensation.

The first of these is an item of $1,757.45 for ties which belonged to petitioner and were furnished by him for the repairing of the road during his receivership, and for which he received forty cents for cross ties and seventy-five cents for bridge ties. It does not appear that the ties were secretly furnished, and the master reports that the road had become unsafe for the operation of trains, and that the wet weather which prevailed rendered it very difficult to haul ties from the timber, so that it was hardly possible to obtain them.

The fact that under these circumstances they were furnished by the receiver himself from a lot he had on hand, does not render the transaction fraudulent *per se*.

If they were taken and paid for by the receiver at an exorbitant price with intent to defraud the company, the case would be different.

This, however, cannot be regarded as proven by the proof before us.

The proof as to the value of the ties is somewhat conflicting, and there is evidence strongly tending to show that petitioner had nothing to do with fixing the price. This whole

subject remains to be considered and reported upon by the master, under bill filed by complainant to surcharge and falsify the accounts of petitioner.

For the present, therefore, we only say that the item is not shown to be fraudulent in such a sense as to deprive petitioner of just compensation for services rendered by him. The same may be said concerning the charge that the petitioner, as receiver, purchased for the road lumber in which he was personally interested.

It appears that petitioner had nothing to do with fixing the price. It is probable that some of this lumber was of inferior quality, and that General Superintendent Russell and the foreman of the car shops fixed a higher price upon it than was just; but in the absence of proof we cannot presume that petitioner knowingly and corruptly received more than his interest in the lumber was worth. As to the other items objected to, there is still less evidence of corrupt purpose, and we do not think it necessary to consider them in detail.

A clear distinction is to be drawn between the question whether the receiver shall be allowed for these expenditures upon final settlement, and the question whether his conduct with respect to them has been such as to deprive him of the right to receive compensation for his services. It is only upon the ground of deliberate fraud that so severe a penalty as a loss of all pay can be with propriety enforced; while on the ground of error or mistake alone the receiver may be charged with the expenditure upon final settlement. It is manifest that we cannot find fraud established by the proof before us. Indeed there is nothing in the answer to petitioner's claim, nor in any of the pleadings forming the issues now on trial, referring to the items to which we have just referred. We notice them because they were made the subject of an unauthorized investigation before the master, and of a report prepared, but not filed, by him, and have been discussed by counsel on the hearing with the understanding that the court should consider them in so far as they are found proper to be

considered in determining the question of the receiver's compensation.

It would be improper for us to discuss the question whether these items and others objected to should be allowed to the receiver in his final accounts.

All questions of that character must be reserved until the hearing upon the master's report upon that subject.

What we now decide is, that there is no showing of such fraudulent conduct on the part of the receiver as should deprive him of compensation for services. The order is that petitioner be allowed for extraordinary services the sum of $4,390, to be credited to him on final settlement.

I have examined carefully the facts upon which the application for additional compensation is claimed, and fully concur in the foregoing opinion of the circuit judge, McCrary.

(Signed) R. R. Nelson, *Judge.*

JACOB GOLDMAN *v.* CONWAY COUNTY.

(Eastern District of Arkansas. October, 1880.)

1. STATUTE OF LIMITATIONS — COUNTY WARRANTS. — Where a county may be sued on its ordinary warrants and compelled by *mandamus* to levy a tax to pay them, the statute of limitations begins to run against such warrants from the date of their issue.

The plaintiff's cause of action is ordinary county warrants, in the form prescribed by statute, issued before the thirtieth day of October, 1874, and presented to the county treasurer for payment, and by him indorsed "not paid for want of funds," more than five years before the commencement of this suit. The statute of limitations of this state declares that "actions on promissory notes and other instruments in writing," and all actions not specifically named in the act, shall be barred in five years after the cause of action accrued. Gantt's

Digest, sections 4125, 4129. The county pleaded the statute of limitations in bar of the action. The plaintiff demurred to the plea.

Clark & Williams, for plaintiff.

John F'letcher, for defendant.

CALDWELL, *District Judge.*— It is well settled that counties may plead the statute of limitations to actions founded on contracts and unliquidated demands. Dillon's Mun. Corp. sec. 533; *Baker* v. *Johnson County*, 33 Iowa, 151. Such a plea may be interposed by a city to an action upon its notes. *De Cordova* v. *Galveston*, 4 Tex. 470. And in Louisiana it is held to be a good plea to an action on warrants issued by the police jury of the parish which are analogous to, if not identical with, our county warrants. *Perry, Adm'r*, v. *Parish of Vermillion*, 21 La. Ann. 645. And the statute begins to run against interest coupons, attached to negotiable bonds issued by municipal corporations, from the time they mature, although they remain attached to the bond which represents the principal debt. *Amy* v. *Dubuque*, 98 U. S. 470. In this state counties are declared to be bodies corporate with power to contract and sue and be sued. This carries with it the right, when sued, to interpose every defense, legal and equitable, which it may have, including the statute of limitations. Not only are counties and all municipal corporations in this state within the protection afforded by the statute of limitations, but the state as well. An act passed in 1855 and still in force, declares that "lapse of time and statutes of limitations shall apply in suits against the state in like manner as suits against individuals, and may be pleaded and relied on with like effect." Sec. 5677, Gantt's Digest. This provision clearly indicates a state policy favorable to statutes of repose.

It is not seriously contested that a county may avail itself of this defense generally, but it is said not to be applicable to this class of paper. The force of this argument depends on

the legal characteristics of these warrants under the laws of the state where issued. Where a county is not liable to be sued on such warrants and cannot be coerced to levy a tax for their payment, the statute probably would not run against them; and the cases of *Justices, etc.* v. *Orr*, 12 Ga. 137, and *Carroll* v. *Board, etc.* 28 Miss. 38, decided this and no more.

But it is the settled law of this court that suit may be maintained on the class of warrants here sued on; and that under section 10 of article 16 of the constitution of 1874, the county court may by *mandamus* be compelled to levy a tax, not to exceed the limit prescribed by that section, to pay a judgment recovered thereon. *Shirly* v. *Pulaski County*, 4 Dillon, 209 and note.

It is also settled that the orders of allowances in pursuance of which such warrants are issued have not the force of judicial judgments which estop or conclude the county, and that every holder of such paper takes it subject to all defenses the county would have against the original payee. *Id.*

They are *prima facie* evidence of indebtedness upon which suit may be maintained and the county coerced to levy a tax to pay them; and where this is the law they stand on the same footing, so far as relates to the statute of limitations, as bonds, coupons, accounts or other demands, which confessedly fall within the statute.

A statute of this state authorizes the county courts to require all holders of warrants to present them to the court "in order to redeem, cancel, re-issue or classify the same, or for any lawful purpose," and declares holders of warrants who do not present them at the time fixed by the court, of which notice is to be given in a mode prescribed by the statute, "shall thereafter be debarred from receiving any benefit from them." Sections 614–616, Gantt's Digest.

It is insisted this method of barring warrants is exclusive of all others. The design of this act is to enable the county court to ascertain with precision the amount of outstanding warrants, and to reject and cancel such as have been illegally

or fraudulently issued, to the end that they may not be redeemed by the treasurer or received by the collector in payment of taxes.

It rests in the discretion of the county court as to whether such calls shall be made; they cannot be made oftener than once a year and may never be made, and if not made, the rights of the county when sued are not affected by that fact.

If this act precludes the county, when sued, from pleading the statute, it is not perceived why it would not preclude it as well from showing the warrants were illegally or fraudulently issued, or any other fact that would have authorized the county court to cancel them if a call had been made.

Another statute provides that all warrants shall be received, irrespective of their number and date, in payment of taxes and debts due the county. Section 610, Gantt's Digest.

When taken in connection with another section of the same act (sec. 1042, Gantt's Digest), the purpose of section 610 is plain. Section 1042 provides that if there is not money enough in the treasury to pay all outstanding warrants, then the treasurer shall pay them only in the order of their number and date; and section 610 was enacted to show that the rule relating to the order of payment of warrants by the treasurer was to have no application when they were tendered to the collector in payment of taxes and debts due the county; that for such purpose there was to be no preference or precedence between warrants bearing different dates. It does not affect the question of limitation.

The warrants are due and payable on the day they are issued, and the statute runs from that date. If construed to be payable on demand they would be payable at once, and the statute would run from their delivery. *Palmer* v. *Palmer*, 36 Mich. 487. Where they are presented to the treasurer and indorsed by him as then required by law, the statute runs from that date.

It is no answer to the plea to say the treasury of the county never contained funds to pay the warrants. They were a legal

tender in payment of taxes, and it was open to the plaintiff by appropriate judicial proceedings to compel funds to be placed in the treasury for their payment, and the right of action accrued when the warrants were issued and not when there were funds in the treasury for their payment. Where a contract was made for work, payable out of a public fund, it was held that the statute began to run from the time the work was completed, although the fund was not then raised. *Emery* v. *Day*, 1 Crompton, M. & R. Ex. 245.

The statute of limitations is one of repose. It is not based upon presumption of payment, but on the impolicy of permitting stale demands and transactions long past to be made the subject of judicial inquiry, and hence neither indisposition nor inability of the debtor to pay is an answer to the plea. There is the same reason for giving counties the benefit of it as individuals.

It is not always true that outstanding warrants have never been paid by the county or that they ought to be paid. It not unfrequently occurs that they are issued illegally and without consideration, and the records of this court disclose the fact that warrants once redeemed were afterwards fraudulently withdrawn and put in circulation.

The county is as likely to be deprived of the evidence of such facts by lapse of time as an individual, and for that reason should have the same protection from the statute.

The form of warrant prescribed by statute contains no seal; there is no statute in terms requiring the clerk to affix the county seal to such instruments, and it is not affixed to the warrants sued on, so that the question of the period required to bar sealed instruments does not arise in this case.

The question whether warrants are valid without a seal was not raised in argument and is not decided.

Demurrer overruled.

THOMPSON *v.* CANTERBURY, Adm'r.

(District of Iowa. July, 1881.)

1. ADMINISTRATOR — NOT LIABLE AS SUCH FOR CERTAIN CONTRACTS, NOR FOR TORT.— An administrator cannot bind the estate by any contract made upon a new and independent consideration, and much less for a tort. The action in such case is not against the administrator officially, but against him as an individual, and in his personal capacity.
2. SAME — SAME.— *Held*, accordingly, that where an administrator undertook to sell and convey certain patented articles in violation of the patent right of the plaintiff, no action could be maintained against the administrator as such.

On demurrer to petition.

Action for damages.

The plaintiff's petition alleges that he is the owner of certain letters patent upon new and improved churns, and has the exclusive right to make and vend the same within certain territory described in this petition, and that the defendant, in violation of his rights, has sold and conveyed to divers parties a number of said churns, whereby plaintiff is damaged, etc.

Bremmerman & Rohde, for plaintiff.

P. H. Smyth & Son, for defendant.

MCCRARY, *Circuit Judge.*— The defendant is sued as administrator for having, in violation of plaintiff's rights, sold and delivered certain patented articles. If defendant did make the sales in question as alleged, he did not thereby bind the estate. Whether his act be regarded in the light of a contract or a tort, it is clear that he did not bind the estate represented by him, and that no recovery can be had against him in his representative capacity, or to be levied *de bonis testatoris*. Even a contract with administrators or executors, made in the interest and for the benefit of the estate, if made upon a new and independent consideration, as for property sold and delivered, or other consideration moving between the promisee and

the executors as promisors, does not bind the estate. This upon the ground that an administrator or executor may disburse and use the funds, or charge the estate, only for the purposes authorized by law, and may not bind the estate by a new contract, thus creating a liability not founded upon a contract or obligation of the testator or intestate. *Austin* v. *Munro et al.* 47 N. Y. 360, and cases cited; Toller's Executors, p. 457. Of course, if the administrator could not bind the estate by a contract to pay plaintiff the sum he now claims as damages, he could not do so by his own wrong in violating the plaintiff's rights under the patent.

As defendant is sued as administrator and not personally, the demurrer must be sustained.

Hart *v.* Pennsylvania Railroad Company.

(Eastern District of Missouri. April, 1881.)

1. Common Carrier — Bill of Lading — Limiting Liability.— A contract entered into between a common carrier and a shipper, signed by both, and fixing the value of property shipped, and thus limiting the liability of a shipper in case of loss by his negligence, is valid, especially in a case where the property shipped is blooded horses, concerning the value of which, persons in general are not supposed to be competent judges.
2. Same — Same — Same.— Where certain horses were shipped by rail and the bill of lading was signed by both carrier and shipper, and provided among other things that the carrier assumed a liability on the stock only to the extent of $200 for each of the horses, or $1,200 for the car-load, and through the carrier's negligence one of the horses was killed and others injured, *held*, in a suit by the shipper for damages, that his recovery cannot exceed the amount fixed in the bill of lading, although he offered to prove that the horse killed was worth $15,000, and those injured were worth several thousand dollars each.

Action to recover damages for breach of contract to transport a car-load of horses from Jersey City, N. J., to St. Louis, Missouri.

The contract was in writing, signed by the plaintiff as well

as by the agent of defendant, and provided among other things that in case of the loss of the horses while in transit the plaintiff should in no case recover more than $200 for each horse, or more than $1,200 for the car-load, which sums are declared in the writing to be satisfactory to the shipper.

On the trial the plaintiff, after proving the killing of one horse and the serious injury of several others while being transported under said contract, offered to prove that the horse killed was worth $15,000; and that the others were worth several thousand dollars each, and that his damages were some $20,000.

The defendant, admitting that the plaintiff's damages amounted to the maximum sum recoverable according to the terms of the contract, objected to this evidence.

The question presented was, whether the contract limiting the amount of the recovery was valid.

Geo. M. Stewart, for plaintiff.

Pattison & Crane, for defendant.

McCrary, *Circuit Judge*, delivered the opinion of the court orally in substance as follows:

The rule is well settled that a common carrier cannot exempt himself from liability for his own negligence or that of his employees, by any stipulation inserted in a receipt or bill of lading, or by any notice given to the shipper. I think it may also be said that this cannot be done even by a contract signed by both parties. If the shipper and carrier should enter into a written contract that the latter should not be liable for damages resulting from his negligence, I think it would be void as against public policy. But it is also true that by contract the liability of a common carrier may be limited, provided the limitation be just and reasonable. The question here is, whether this contract is an attempt to exempt the carrier from the consequences of his own negligence, or a reasonable lim-

itation upon his responsibility, fixed by the contract of the parties. The question is important and perhaps somewhat doubtful, but my conclusion is that the contract falls within the latter rule. It seems to me to be a reasonable regulation which requires the shipper of a race horse worth $15,000 to notify the carrier of the character and value of the animal, and offer to make a special contract for his transportation.

Men in general are not able, upon casual inspection, to judge of the value of such an animal. A carrier may be imposed upon by parties shipping blooded stock if he is not permitted to make such a contract. This case will illustrate the reasonableness of this rule. If the carrier had been informed that one of the horses to be transported was worth fifteen thousand dollars, he might have used extra care in preventing damage to it, and would have been entitled to a larger compensation for his services. If a shipper chooses to remain silent as to the character and value of an animal shipped upon a railroad, and enters into an agreement providing what his loss shall be if the animal is killed, I think he is estopped to claim more. It is said that the shipper is at the mercy of the carrier, who may refuse to carry the animals unless the contract is signed. Not so. The carrier is bound to transport the animals in such a case, upon being informed of their value, without the signing of a contract by the shipper limiting the carrier's responsibility. The shipper may offer his animals for transportation, inform the carrier as to their value, refuse to sign the contract, and the carrier will be bound to receive and transport the animals for a fair and reasonable compensation, and upon refusing so to do will be liable in damages.

A common carrier is bound to serve the public without discrimination, and has no right to demand the signing of a special contract as a condition precedent to receiving and carrying freight for a particular individual. If shippers will stand upon their rights in this regard the carriers will find themselves compelled to acquiesce.

In my opinion the plaintiff in this case had a perfect right

to refuse to sign the contract, and to insist upon the transportation of his horses without unnecessary delay at the usual, or at reasonable rates for such animals. By signing the contract he waived this right and agreed upon a maximum valuation of his own property, which I think it was competent for him to do.

Judge Treat concurs in this view.

McCRARY, *Circuit Judge*, subsequently charged the jury as follows:

"*Gentlemen of the Jury:* The amount of the recovery of the plaintiff here must be determined by the construction of the contract under which the horses were shipped. It is for the court to construe the writing. It provides that Lawrence Hart, the plaintiff, delivered, to be transported in safe and suitable cars of the Pennsylvania Railroad Company, from Jersey City to St. Louis, Missouri, live stock of the kind mentioned, upon terms which are admitted and accepted by the plaintiff as just and reasonable. The defendant, the Pennsylvania Railroad Company, as a common carrier, assumes a liability on the stock to the extent of the following agreed valuation: 'If horses or mules, not to exceed $200 each; if for a chartered car, $1,200 for the car-load.' The contract then proceeds to give the values of certain other live stock, which it is not necessary to read.

"The court has considered, as well as we could in the brief time we have had, as to what the true construction of that contract is, and as to whether it is a valid or a void contract. It is not necessary that I should go into any discussion of the question in the charge I give to you. We have reached a conclusion, as you have already learned, that it is competent for a shipper, by entering into a written contract, to stipulate the value of his property, and to limit the amount of his recovery in case it is lost. The plain agreement here is that the recovery shall not exceed the sum of $200 each for the horses, or $1,200 for a car-load. It is admitted here by counsel for the

defendants that under this charge the plaintiff is entitled to recover a verdict for $1,100, and, under the charge of the court, the plaintiff agrees that he can recover no more. It is simply your duty to find a verdict for that amount."

NOTE. — See Lawson on Contracts of Carriers, chapters IV and V, and numerous cases there cited.

McCUTCHEN *v.* RICE COUNTY.

(District of Minnesota. ———, 1881.)

1. TAXATION — PERSONAL PROPERTY — CHANGE OF RESIDENCE. — A statute of the state of Minnesota, in force in the year 1876, imposed a tax upon "all personal property of persons residing" within the state, in reference to the quantity of such property held or owned by such residents on the first day of May of that year. *Held*, that the personal property of one who had been a resident of the state, but who was *in itinere* on the first day of May, 1876, for the purpose of making the city of New York the place of his future residence, was subject to taxation under the Minnesota statute.
2. SAME — NON-RESIDENT. — In the year 1877 the statute of the state of Minnesota was amended so as to impose a tax upon "all personal property employed in trade or business" within the state. *Held*, that personal property employed within the state for the purposes of private banking, and for the loaning of money on bond or note and mortgage, was employed in business within the meaning of the statute, although such business was in the process of being closed up.
3. SAME — SAME. — In the year 1878 the statute of the state of Minnesota was amended so as to impose a tax upon "all personal property" within the state. *Held*, that the statute subjected all personal property within the state to taxation, irrespective of its ownership.

G. E. Cole, for plaintiff.

O. F. Perkins and *G. N. Baxter*, for defendant.

NELSON, *District Judge*. — This suit is brought to recover back from the county of Rice, in the state of Minnesota, the personal property tax of plaintiff, paid under protest, for the

years 1876, 1877 and 1878. It was removed from the state court by the plaintiff, upon the ground that he was a citizen of the state of New York when the suit was commenced, and a jury trial is waived by stipulation on file.

The following sections of the statute were in force when the taxes were levied in 1876:

"Section 1. All real property in this state, and all personal property of persons residing herein, the property of corporations now existing or hereafter created, and the property of all banks or banking companies now existing or hereafter created, and of all bankers, except such as is hereinafter expressly exempted, is subject to taxation, and such property, or the value thereof, shall be entered in the list of taxable property for that purpose, in the manner prescribed by this act: *provided*, that railroad, insurance and telegraph companies shall be taxed in such manner as now is or may be hereafter fixed by law."

Section 6 declares that personal property shall be listed for taxation between the first Monday in May and the fourth Monday in June, in reference to the quantity held or owned on the first day of May. Personal property purchased or acquired on the first day of May shall be listed by or for the person acquiring it.

"Section 7. Personal property shall be listed in the manner following: *First*, every person of full age and sound mind, being a resident of this state, shall list all his moneys, credits, bonds or stock, shares of stock of joint-stock or other companies (when the property of such company is not assessed in this state), moneys loaned or invested, annuities, franchises, royalties and other personal property; *second*, he shall also list all moneys and other personal property, invested, loaned, or otherwise controlled by him as the agent or attorney, or on account of any other person or persons, company or corporation whatsoever, and all moneys deposited subject to his order, check or draft, and credits due from or owing by any person or persons, body corporate or politic.

"Sec. 8. Personal property, except such as is required in this act to be listed and assessed otherwise, shall be listed and assessed in the county, town or district where the owner resides. The capital stock and franchises of corporations and *persons*, except as may be otherwise provided, shall be listed and taxed in the county, town or district where the principal office or place of business of such corporation or *person* is located in this state. If there be no principal office or place of business in this state, then at the place in this state where any such corporation or *person* transacts business."

In the year 1877, and before the tax of that year was levied, section 1 was amended so as to read:

"All real property and all personal property employed in trade or business in this state, and all personal property of persons residing herein, * * * is subject to tax," etc.

In 1878 section 1 of the statute in force read:

"All real and personal property in this state * * * is subject to taxation."

FINDING OF FACTS.

The plaintiff, an unmarried man, a native of Ireland, had resided previous to the twenty-seventh of April, 1876, and for many years, in the city of Faribault, in the state of Minnesota. He was engaged in private banking, and loaning money on bond or note and mortgage. Being in infirm health, he determined to close up his business, abandon Faribault, and make the city of New York his permanent residence. In April he left Faribault and was *in itinere* to New York, stopping at Philadelphia, where he was on May 1st, the day fixed by statute for listing personal property for the purpose of taxation. The personal property not being listed by the plaintiff or his agent in charge of his business, which was in process of being closed up, was returned by the assessor and the tax collected or paid by the agent involuntarily. In 1877 and also in 1878 the personal property remained in the state of Minnesota, and was successively taxed under the laws existing

during those years. The plaintiff reached the city of New York about May 3, 1876, stopping at a hotel for two weeks, when he gave up his room, leaving his heavy baggage at the house, and traveled until November 1st, when he visited a nephew in Brooklyn, remaining there until January 7, 1877, when he went south, returning to New York the last of April, and then visited Faribault, where he stayed during the months of July, August and part of September, to look after and settle up his business matters, as he testifies. He returned to New York in September, and nine days after sailed for Europe, remaining abroad over two years and until October, 1879, when he came back direct to Faribault and there remained until February, 1880, when this suit was commenced, and then returned to New York.

The plaintiff testifies that he abandoned his residence in Faribault in April, 1876, and intended to make thereafter his permanent residence in New York.

CONCLUSIONS.

For the purposes of taxation the plaintiff cannot be without a residence, and, in my opinion, although he intended to abandon a residence in Faribault, Minnesota, and left there for that purpose in April, 1876, with the intention of making the city of New York his future residence, yet not having in fact reached that city before May 1, 1876, he had not acquired a new residence so as to escape taxation in the state of Minnesota. I therefore determine:

1. That the facts do not show a change of residence to defeat the tax levied upon plaintiff's property for the year 1876. The plaintiff's residence for the purpose of taxation was in Minnesota, May 1, 1876, and the personal property taxed was owned by him as a resident of the state of Minnesota at that date.

2. That the law of Minnesota existing in 1877 taxed personal property employed in trade or business in the state, whether the owner was a resident or non-resident. I think

the personal property taxed was employed in business within the meaning of the tax law of 1877.

3. The law of 1878 taxed personal property in the state irrespective of ownership, and the tax for this year was legally imposed.

I have not written an elaborate opinion in this case for the reason that it was intimated by counsel at the hearing that a writ of error would be taken to the United States supreme court in any event, and I content myself with an announcement of my conclusion upon the facts and law as I understand them. Judgment will be entered in favor of the defendant, and a writ of error is allowed.

WALKER *v.* FLINT and others.

(Eastern District of Missouri. January, 1881.)

1. PRACTICE — JURISDICTION — MOTION TO DISMISS. — A jurisdictional question cannot be raised by a motion to dismiss, except where the want of jurisdiction appears on the face of the record.
2. SAME — PLEA IN ABATEMENT. — Where facts not of record have to be shown, the question should be brought before the court by a plea in abatement.
3. JURISDICTION — INTERFERENCE BETWEEN STATE AND FEDERAL COURTS. — State and federal courts cannot lawfully interfere with each other where each is acting within legal limits.
4. SAME — CUSTODY OF PROPERTY. — A federal court will neither interfere with property in the lawful custody of a state court, nor tolerate interference by a state court with property in its custody.
5. SAME — PROPERTY NOT LAWFULLY IN CUSTODY OF STATE COURT. — An insurance company built a house partially on its own land and partially upon that of A., without A.'s consent, and leased it to B. & C. Thereafter the company was dissolved by a decree of the state court having jurisdiction, and all its property vested in D., the state superintendent of insurance. B. & C. then attorned to D. A. and B., C. and D. were citizens of different states. After the attornment to D., A. brought suit against B., C. and D. in the federal court, to recover possession of the property of which he had been dispossessed. *Held*, that the federal court was not ousted of its jurisdiction by the attornment of B. & C. to D.

Walker v. Flint and others.

Ejectment. Motion to dismiss.

Sansum & Jones, for plaintiff.

Carr & Reynolds, for defendants.

TREAT, *District Judge.*—This is an action of ejectment, in which the plaintiff has set out with great particularity his deraignment of title, through proceedings in partition, to which the Life Association of America became a party. The final decree in said partition suit allotted to the plaintiff the premises in dispute. Said decree was entered in June, 1877, and duly recorded.

In July, 1878, the Life Association of America destroyed the fence previously erected by plaintiff along the division line of the lots assigned to him by the decree in partition, and erected a building partly upon plaintiff's property. Said association thereafter leased said building to the Flints and Coans (parties defendant). Suit for the dissolution of said association was instituted October 13, 1879, in the proper state court, which ripened into a final decree on November 10, 1879, whereby the title to all of the property of said association vested absolutely in Relfe, the state superintendent. Thereupon the said Flints and Coans attorned to said Relfe.

The plaintiff in this action made the defendants in possession and said Relfe the defendants to the suit. A motion was subsequently made to dismiss as to said Relfe, which was resisted by him. The court overruled the motion, on the ground that as the landlord might, under the Missouri statutes, make himself a party, and that as the plaintiff had chosen to bring him in, it would be idle to dismiss as to him, and then have him take leave to appear *instanter*. Now, said landlord being defendant of record, appears specially and moves to dismiss the suit on the ground that the premises in dispute are *in custodia legis* of the state court through his tenants and himself, as a state officer, in whom there has been vested by operation of law the title, whatever it may have been, of said

dissolved association. The motion is supposed to rest on the doctrine stated in *Taylor* v. *Carryl*, 20 How. 584; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Thompson* v. *Scott*, 4 Dill. 504; *Conkling* v. *Butler*, 4 Biss. 22; *Wiswall* v. *Sampson*, 14 How. 52; *Beals* v. *Phipps*, 14 How. 368, and other cases cited.

The present suit was brought in this court after said Relfe had become vested by decree of the state court with the title of the Life Association, and after the attornment to him by the tenants in possession.

The technical question exists as to the mode of proceeding, viz.: Can a motion to dismiss raise the question desired to be presented? If there appears on the face of the record that the court had no jurisdiction, a motion to dismiss would be proper. But other facts have to appear in this case to raise the jurisdictional question,—such as the proceedings in the state court, etc.,—which facts are stated at length in the motion and supplemented by the state record, etc. Hence, the question should come before the court through a plea in abatement. The parties, however, to avoid technicalities, costs and delay, assert that the question may be considered as on a proper plea in abatement.

This court has had occasion, within the past year, to express its views upon supposed conflicts of jurisdiction between state and United States courts in like cases.[1] The rule is that when a state court has, through any of its officers, custody of property, a United States court will not interfere with said custody, and, on the other hand, will not permit interference with its own custody. That rule is essential, under our complex system of government, to due harmony of administration, and to avoid unseemly conflicts. It rests not on comity alone, but on the true theory of our governmental system, state and federal. There is to be no interference, one with the other, where each is acting within legal limits; but, on the other hand, neither

[1] See *Levi* v. *Columbia Life Ins. Co.* 1 Fed. Rep. 206.

is to transcend legal or constitutional limits, or deprive a party of his constitutional rights.

It is often difficult to ascertain the precise limits to be observed under the rules just stated, as it is to reconcile adjudications had. The cases above cited, and the two cases of *Payne* v. *Hook* in the United States supreme court, seem not to be in accord. Whether so or not, the case before the court is free from such embarrassment. The rights of all parties had been settled by the partition decree in the state court, despite which one had become a trespasser on the premises of the other. Because the trespasser passed into liquidation under a state law, and his tenants who were co-trespassers attorned to the state liquidator, the real and adjudicated owner, being a citizen of another state, could not be thus deprived of his constitutional right to be heard in this court. The point decided is, not that of interference with the undoubted possession, rightfully, of property by the officer of another court, but that of an attempt to oust this court of jurisdiction by the attornment of trespassers to such trespassing officer.

The motion to dismiss is overruled. If a plea of abatement were interposed, embodying the statement of facts contained in the motion to dismiss, a demurrer thereto would be sustained.

RUTZ and others *v.* CITY OF ST. LOUIS.

(Eastern District of Missouri. January, 1881.)

1. RIPARIAN RIGHTS — LIMITS OF STATE AUTHORITY. — The limit of the authority of states bordering on a navigable river is to protect their own shores and harbors without interfering with the opposite shores or common rights of navigation.
2. SAME — NUISANCE. — Where such a state authorizes a structure, which, but for such authorization, would be considered a nuisance, its own citizens must accept the legal consequences, though not without the recovery of damages; but it cannot pass a law to govern a state bordering on the opposite shore, or its citizens, or the realty situated therein.

3. PRACTICE — DEMURRER.— The petition alleged that the plaintiff was the owner of real estate in Illinois, opposite the city of St. Louis, and bordering on the Mississippi river; that said city had caused a dyke to be built on the Missouri shore *unlawfully*, which dyke had caused plaintiff's land to be washed away. *Held*, that the defendant could not raise the question of the lawfulness of the dyke under the Missouri statutes, by demurrer to the petition, but should inform the court by answer, on trial, whether the dyke interfered with the navigability of the river, and transcended the power of the state.
4. SAME — LOCAL ACTIONS.— *Held, further*, that the old rule as to local actions was not applicable to a suit of this nature.

Demurrer to petition.

Baker & Fletcher, for plaintiff.

Leverett Bell, for defendant.

TREAT, *District Judge.*— This is an action at law for the recovery of damages consequent upon the alleged injuries caused by defendant. The plaintiff was owner of real estate in Illinois, opposite the city of St. Louis. Said city built, it is averred, on its shore, unlawfully, a dyke, whereby forty acres of plaintiff's land was washed away. A demurrer is interposed on two grounds:

First, that the action is *local*, being for damages to the realty of the plaintiff in another jurisdiction.

This suit is brought in the United States circuit court here, of which the defendant, a corporation, is an inhabitant, within the meaning of the acts of congress pertaining thereto. Being a municipal corporation it could not be an inhabitant of, or found within the jurisdiction of Illinois or of the United States circuit court for said district; and hence, if the common-law rule as to *local* actions must prevail, the plaintiff is remediless, practically, however great the wrong sustained, because no legal service could be there had.

It seems that the *old* rule as to *local* actions should not be considered applicable to suits of this nature. Where there is a wrong there must be a remedy. The injury in this case was caused by defendant acting within another jurisdiction.

Second. Defendant contends that the dyke built by it was under authority of Missouri statutes, and consequently was not *unlawful*, despite the averments in plaintiff's petition to the contrary.

Can such a proposition be raised by demurrer to the petition? If the United States courts are bound to take notice of public acts of every state, and the state of Missouri, by statute, authorized the dyke to be erected, then it was a lawful structure, intraterritorially, if properly erected, and does not fall within the rules concerning nuisances. *Transportation Co.* v. *Chicago*, 99 U. S. 635; Weeks, Damnum Absque Injuria, § 8; *Radcliff* v. *Mayor*, 4 Comst. 195; and various other cases cited, especially *Imler* v. *Springfield*, 55 Mo. 125.

There are, however, other and graver considerations involved, to which the attention of counsel was directed in the course of the argument, with the request that they would examine the same, and the authorities to which the court referred. In the absence of any such aid, the court is asked to pass upon a grave question concerning the rights of riparian owners on opposite sides of the river to that where dykes, etc., are constructed, provided such a question can, in the present state of the pleadings, be raised by demurrer. Among the cases which serve to throw light on this subject are *Northwestern Packet Co.* v. *Atlee*, 2 Dillon, 479, and S. C. 21 Wall. 389. The substance of those decisions is that a state, in the absence of congressional legislation, may authorize the erection of structures on its own shore, and that its citizens affected thereby cannot complain of the same as a nuisance, with right of recovery for special damages under such a rule; but those decisions do not go to the extent that an individual acting under the supposed authority of state legislation can obstruct the navigability of the Mississippi river, which is a common highway. The limit of state authority is to protect its own shores and harbors, without interfering with the common rights of navigation. Where its statute authorizes a structure, its own citizens must accept the legal consequences, though not without

recovery of damages; but Missouri cannot pass a law to govern Illinois, its citizens, and their realty situate in Illinois. If, pursuant to a Missouri statute, a dyke was erected destructive of property in Illinois belonging to the citizens of the latter state, such statute cannot be pleaded against them, for the Missouri statute could not operate extraterritorially.

The question intended to be raised by demurrer cannot be so raised. The court must be informed by answer, on trial, whether the dyke interfered with the navigability of the river, and transcended the power of the state in the premises. It is obvious that if, in the absence of congressional legislation, each state bordering on the Mississippi river may prescribe what its citizens may do, destructive of the navigability of the river, and to the great damage of owners occupying the opposite shore, then such a state statute would have an extraterritorial effect — a proposition not admissible.

In the light of the views thus presented, the demurrer must be overruled, so that the parties may present to the court the facts on which their respective rights are based.

Since the foregoing opinion was written, Judge McCrary has passed on a question, not the same as that here presented, but one which throws some light on the subject — *City of St. Louis* v. *The Knapp-Stout Co.* If an answer is put in setting out all the facts and private statutes, the court will have before it all the legislation and facts to enable it to decide — (1) Whether the city had lawfully authority to erect a dyke; (2) whether, if such authority existed, it erected the dyke as the law required; (3) whether damages of the kind named are not recoverable, when, acting under a public statute, a private individual or municipal corporation destroys the property of others; (4) whether the riparian owner on one shore of the Mississippi, whether a municipal corporation or otherwise, can interfere with the navigability of the river, or, if not doing so, can, for its own benefit, divert the channel to the injury of the owner on the opposite shore.

WEBSTER and others *v.* BUFFALO INSURANCE COMPANY.

(Eastern District of Missouri. January, 1881.)

1. ULTRA VIRES — CONTRACT OF INSURANCE. — An insurance company is not estopped from setting up the fact that a contract of insurance made through its agent is *ultra vires*, though its agent had led the other contracting party to believe, and he did believe, that the company had power to make it, and though no pretense was set up by the company or its agent that the contract was *ultra vires* until a loss thereunder was known by all parties to have occurred.

This was a suit upon a contract of insurance against marine risks. The petition alleged that a cargo consigned to plaintiffs, and covered by defendant's policy of insurance, had been lost at sea, and asked judgment for the amount of the loss. The answer of the defendant set up in substance that the contract of insurance was *ultra vires*, for the reason that the defendant had no power, under its charter, to insure against perils of the sea. The plaintiffs demurred to the answer on the ground:

First, that it contained no defense to the plaintiffs' cause of action; *second*, because the defendant was estopped from pleading its want of power to make the contract sued upon, and because the government which created it (New York) alone has power to deal with it for a violation of its charter, privileges, etc.

The demurrer was overruled, and plaintiffs replied and alleged:

That they were led to believe by defendant's agent who issued the policy, and did believe, that the defendant had power, under its charter, to insure against perils of the sea; that defendant's agent insured them against those perils, etc.; and that no objection was made to the contract aforesaid by defendant or its agent, and no pretense was made that said contract was *ultra vires* until the loss had occurred, and it was too late to insure in another company; and that for those rea-

sons defendant should be held estopped from pleading that said contract was *ultra vires*.

The facts stated in reply are admitted to be true.

Lee & Chandler, for plaintiffs.

O. B. Sansum, for defendant.

TREAT, *District Judge*. — This case was heretofore presented to the court, Justice Miller present. The demurrer to the replication raised the question whether the facts alleged would operate as an estoppel, although the contract, as averred in the answer, was *ultra vires*. It was suggested by Justice Miller that it would have been better if defendant had so shaped his answer as to bring before the court the charter of the company, together with the terms of the contract, so that the court could determine whether the contract was *ultra vires* or not. But as that course had not been pursued, it was then for the court to decide whether, admitting the contract to be *ultra vires*, the defendant was estopped by the facts stated in the replication.

On the demurrer to that replication Justice Miller and myself differed in opinion, and consequently judgment followed according to his views. Now, the cause having come on for trial without the intervention of a jury, and all the facts in the replication being admitted of record, the main question is whether, according to the charter under the laws of New York, the defendant corporation had authority, through its agents or otherwise, to make a contract of insurance of the kind stated; that is, on a sea-going or foreign voyage, as contradistinguished from an inland voyage. According to the terms of the charter the contract was *ultra vires;* and, although all the facts set out in the replication are true, as admitted of record, yet, according to the opinion of Justice Miller, the plaintiff cannot recover in this case, and his opinion must control despite my dissent.

Therefore judgment must be entered for the defendant.

Buckley and others *v.* Sawyer Manufacturing Company.

(Eastern District of Missouri. January, 1881.)

1. Contract — Reverter of Patent-Right. — A patent owned by A. and B. was assigned by them, as to certain states, to E., a corporation. The consideration of the assignment was the payment to the grantors of $8,500 cash, and the issuing of a prescribed number of shares of stock in E. to them. The cash was paid and the shares issued. The condition of the contract required the payment of a royalty to A. and B., and also exacted, under penalty of forfeiture, the use by E. of reasonable diligence, and its best endeavors to make the corporate scheme a success, the corporation having been organized to manufacture the patented article. On the other hand, A. and B. agreed to exercise reasonable diligence to promote the success of the enterprise, under the penalty of forfeiture of all rights of reversion. F. was a large stockholder in E., and, as such, furnished the required capital. The corporation was organized in 1872, failed in 1873, and F. purchased its assets, including the patent-right, but did not subsequently comply with the condition as to diligence, etc. Suit was brought by A. and B. to have the right acquired by F. declared forfeited. *Held*, that, as it appeared that the plaintiffs had received the full value of their patent-right, and were stockholders in E., which they had caused to be formed, and that as there was a failure on their part to comply with their promises as to making the business a success, no right of reverter or forfeiture existed.

In equity.

Seneca N. Taylor, for plaintiffs.

W. G. Rainey, for respondent.

Treat, *District Judge.*— A patent owned by plaintiffs was assigned, as to designated states, to the defendant company, on payment of $8,500 cash, and the issue of a prescribed number of shares in the defendant corporation.

The cash was received and the shares issued. The conditions of the contract required the payment of a royalty, and also exacted, under penalty of forfeiture, the use by defendant company of "reasonable diligence" and "its best endeavors" to make the corporate scheme a success. On the other hand, the granting party agreed to exercise reasonable diligence to

promote the success of the enterprise, under the penalty of forfeiture of all right of reversion. The scheme proved a failure, for reasons which are disputed.

The defendant Givens paid his money as a stockholder, which seems to have been the cash required, and when the corporate scheme failed became the purchaser of the assets of the corporation, including the patent-right. The organization of this corporation was in 1872, and its failure was in 1873. The defendant Givens, who seems to have been the principal capitalist, became the purchaser of its assets to save for himself something from the wreck. The present contest is as to the forfeiture of the grant. If the defendant corporation did not do what it promised, then the transfer of the patents to it was to be void. If, on the other hand, the plaintiffs in this suit did not perform what they agreed to do, the right of forfeiture or reverter was at an end. The struggle through the evidence is to show which of the respective parties was delinquent. It is clear that the scheme was to organize a corporation to operate plaintiffs' patent, the patent to be assigned for designated states at the price of $8,500 cash (which was paid), and a prescribed number of shares in said corporation to be issued to said plaintiffs, with a royalty. Hence, the plaintiffs not only received the cash, but the shares, and became, as such shareholders, interested in the proper conduct of the corporation.

It appears from the evidence that the plaintiffs were the promoters of the scheme, and that the strangers who embarked in it did so on the faith that the plaintiffs would push the same to a success. The defendant Givens, who seems to have been the victim of this corporate enterprise, became finally the owner of the assets of the corporation, including the right to the patents. He has not operated under them nor paid any royalty. The contest is whether, as assignee of the corporate assets, he can hold them discharged of all right of reverter, or whether, from non-fulfillment of the original agreement, it ought to be rescinded. It must be remembered that the orig-

inal transaction was in 1872, and the failure of the enterprise in 1873.

The excuse for delay in instituting this suit is that negotiations for compromise were pending. There is, however, a barrenness of testimony upon matters which might shed some light on the case. A company in Connecticut, which was identified with the defendant company, may or may not have pursued the enterprise with success, and no proper evidence is produced whereby it can be determined what is the real amount in controversy. A sharp analysis of the pleadings and evidence shows that the plaintiffs have received more than the full value of the patent-right; that they were large stockholders in the defendant corporation, which they caused to be formed on their representations — a speculative scheme; and that through their failure to do what they promised no right of reverter, forfeiture or rescission exists.

The bill will be dismissed at plaintiffs' costs.

LANCASTER *v.* COLLINS.

(Eastern District of Missouri. January, 1881.)

1. NOTICE — OFFICER — INDIVIDUAL. — A person will be held to have notice as an individual of what he does as president of a corporation.
2. SAME — FRAUDULENT TRANSFER. — A., the indorser of a promissory note, was sued together with B., the maker, by E., an innocent holder for value, and judgment was recovered, part of which A. paid, and then sued B. for the amount so disbursed. B. set up as a defense in his answer that the note had been given by him, indorsed by A., to F., a corporation, in part payment for stock in F., of which A. was president; that the balance due on the stock was paid in cash and the note secured by a deposit of the stock with A.; that F. agreed with B. that he might, within one year from the date of the note, have the privilege of forfeiting the stock and cash paid, and be released from all obligation to F., and that in the mean time the note should not be negotiated; that B. had been induced by A. to make the agreement; that A., as president of F., negotiated the note contrary to

the agreement; and that B. had, within the year, notified F. that he elected to forfeit the cash and stock and be released, as aforesaid. *Held*, that the answer set up a good defense.

Motion for judgment on answer.

George A. Castleman, for plaintiff.

D. P. Dyer, for defendant.

TREAT, *District Judge.*—The petition sets out the making by defendant of a note, to the order of the Big Muddy Iron Company, for $10,000, on which there were successive indorsements. The plaintiff was one of the indorsers before maturity. After demand, protest and notice, the innocent holder of the note for value brought suit, and obtained judgment against the defendant (the maker of said note) and some indorsers, including the plaintiff. By the proceedings had on said judgment, the plaintiff, as indorser, paid one-half of the amount thereof, and now brings this suit to recover of the maker (the defendant) what the plaintiff thus paid under judicial process. The defense is that the plaintiff, being president of the Big Muddy Iron Company, solicited the defendant to subscribe to certain shares of the capital stock of said company, under an agreement for the payment of $3,000 in cash, and the execution by defendant of his note for $10,000, payable in ninety days; said shares to be deposited with plaintiff as collateral to the note, and with the privilege to defendant of renewal, and, within one year, to forfeit the cash paid and the shares of stock, and be discharged of all further obligation on the note. The notice of said right to elect a forfeiture was duly given by the defendant. Whether said shares of stock were duly forfeited to the company, or the same were surrendered by the plaintiff accordingly, pursuant to defendant's notice, does not appear; but it is averred, in the answer, that the plaintiff never has tendered to defendant the said shares.

In this state of the pleadings a motion for judgment on the answer is interposed.

The plaintiff was the fourth indorser, with full knowledge of all the facts stated, for he had, as president of the company, negotiated the transaction, and presumably the note had been negotiated, with his knowledge, in violation of the agreement. Said note being negotiable in form, innocent parties for value had a right to rely upon its tenor. Hence judgment was had upon it by an innocent holder for value against the defendant, plaintiff and others. The plaintiff paid part of said judgment. What, then, under the averments, is the right of the plaintiff as against this defendant? He induced the stock subscription and the giving of the note under the agreement made. After prior indorsements, to which the plaintiff added his indorsement, the note was negotiated to the bank. He is not only charged with notice of the original equities, but had actual knowledge thereof, and the proceeds of said note, presumably, went to the company of which he was president, or to himself personally. As to third parties, his obligation as indorser was perfect; but, as between him and the maker, what were his rights and duties? He knew that the note was to be renewed and finally cancelled on notice and the shares surrendered, which shares were deposited with him for the purpose. He was the promoter of the corporate scheme, and on the faith of the agreement made by him with the defendant the note was delivered. Had the note remained in the hands of the company, as agreed, it would have been subject to the terms of the agreement. When the company passed said note to the first indorsee, if an innocent holder for value, the latter had a right of action thereon against the maker and the company who indorsed the same. The note, through the indorsement of the first and of a second indorsee, passed to the plaintiff, who knew all the facts and was charged with the original equities. Why, then, is he not subject to said equities? Can the fact be that while he, as president of the company, made the agreement, he, as an individual, is exempt from the equities, because he acted in different capacities in different stages of the transaction?

The case as made by the pleadings may be briefly stated: The president of a corporation induced a subscription for shares on the terms named, and had placed in his hands the shares of stock accordingly. In order to negotiate the note and enable the corporation to realize thereon, he became the last indorser. The last holder obtained judgment, of which the plaintiff had a part, still holding the shares of stock under the circumstances stated. What are his legal rights against the maker of the note? What he knew as president of the company he knew privately. He knew, consequently, that the note was to be renewed, and that the obligation of the maker was to cease on notice given, and the shares of stock in his hands to be forfeited, whereby the maker of the note (the defendant) was to lose the $3,000 in cash paid by him and all interest in the shares of stock. The relationship of the plaintiff to defendant in this transaction is not so clearly stated as might be desirable; yet enough is disclosed to show that if what is averred in the answer be true there can be no recovery.

If the court looks carefully into the transaction it may be that the plaintiff, in order to raise funds for the corporation or for his private purposes, disposed of the note, with his indorsement, regardless of the agreement made. He had the shares in his hands as collateral and subject to forfeiture, and may have been satisfied therewith as sufficient indemnity. If the note had never been negotiated, then, on notice given by the defendant, the $3,000 paid in cash, and the shares of stock, would have been forfeited to the corporation and the transaction closed. But the corporation, despite the agreement, set the note afloat, whereby innocent holders for value were protected, but the plaintiff, who was not an innocent holder, and who knew the facts, cannot hold the defendant for what he (the plaintiff) has had to pay through his own agency in this scheme to defeat the rights of the defendant. If the plaintiff acted in this matter, at the outcome, for said corporation, it may or may not be that he has a cause of action against said

corporation. He cannot, however, sever his knowledge as president from his private knowledge of what he did as president. He knew the equities and is chargeable therewith; wherefore the motion for judgment must be overruled.

HALL *v.* SCOTT COUNTY.

(Eastern District of Missouri. February, 1881.)

1. COVENANTS OF SEIZIN RUN WITH THE LAND. — A covenant that land conveyed is "the property" of the grantor, and that it "has a good right to sell and convey the same," runs with the land, and will inure to the benefit of a subsequent transferee.
2. AGENCY — POWER TO SELL. — The agents of a county, empowered to sell property, can sell only the title and interest of the county, however the proceeds of the sale are to be applied. *Henry* v. *Atkinson*, 50 Mo. 266.
3. COVENANT — CONSTRUCTION OF. — A covenant of title should be taken in connection with the terms of the deed, and as only applicable to lands thereby conveyed.

Robert Harbison, for plaintiff.

Louis Houck and *William Hunter*, for defendant.

TREAT, *District Judge.* — This is an action at law to recover on the alleged covenants by defendant in its deed to plaintiff's grantors of certain tracts of land, the title to which never was in the defendant. The absence of title was only as to some of the tracts scheduled, and the claim for recovery is as to the proportionate value of said tracts.

Many points have been urged involving the power of the county court to convey such lands in any other than the alleged statutory mode. The lands were swamp and overflowed lands, the title to which passed from the United States to the state of Missouri, and from the latter to the defendant. By the terms of the state grant nothing passed to the defendant except what was in Scott county. The general law provided, it is urged, the manner in which the county might sell the

same; also, the *minimum* price per acre; which limitations on the county authority, it is averred, were wholly disregarded. How that may be it is not necessary now to determine.

Under the rulings of the supreme court of Missouri, notably in the two cases reported in 23 Mo. (*Dickson* v. *Desere's Adm'r*[1]), the covenants of title ran with the land, and damages for the breach are recoverable by the present grantee from the original covenantor, provided the county court had power to make said covenants, and was not restricted to a single conveyance of the county's right, title and interest in the property.

Grants are sometimes to a county for a specified purpose,—as for the benefit of the public schools,—and consequently, if the county court could sell and warrant, and a breach of warranty should follow, it might be that the general revenues of the county could be made to answer instead of the specific fund. That question has been often discussed, and it has been held by the supreme court of Missouri, in accordance with sound principle, that the agents of a county empowered to sell property can sell only the title and interest of the county, however the proceeds of the sale are to be applied.

If there passed into the county treasury, either for general or special uses, the purchase money received for the property, it might seem that the principle on which *Wood* v. *City of Louisiana* was decided ought to cover the case. But the distinction between the two cases is clear.

It is unnecessary, however, to pursue such inquiries. It is patent, from the terms of the deed, that the parties understood that no tract of land outside the county was to be conveyed, and all swamp and overflowed lands inside, with the express exception named, should pass. The terms of the deed are clear and precise to that effect. The sale was in gross. The schedule annexed was admitted to be imperfect. The words of the deed are:

"All the lands in said county of Scott, wherever *therein*

[1] 23 Mo. 151; *Chamber's Adm'r* v. *Smith's Adm'r*, id. 174.

situated, belonging to said county of Scott, and known as the swamp and overflowed lands in said county [except the lands known as the Cairo & Fulton Railroad lands], all of which swamp and overflowed lands belonging to said county at this date are embraced, as *it is believed*, in the schedule hereinbefore set forth; but all such swamp and overflowed lands belonging to said county [except, etc.] being embraced in this sale, and conveyed by this deed, whether contained in said descriptive schedule, or by error or oversight or otherwise omitted from the same, or erroneously described therein," etc.

The covenant relied on by plaintiff follows in the deed the foregoing description, and must be held restricted thereto. It is now ascertained that some of the tracts named in the schedule are outside of the county, and this suit is to recover the supposed value thereof, under the covenants of title. If the well-settled canons of construction are resorted to, it must be held that the plain intent of the deed was to convey no lands not belonging to the county, and none situate outside of the county; also, no lands except swamp and overflowed lands. There seems to have been some uncertainty as to what lands, according to United States survey, had passed by legislative grant, and hence the original bargainers and the county court expressed in the deed that despite omissions or inaccurate descriptions all such lands in the county, and belonging to the county, should pass. To give more definiteness as to the lands, a schedule of the tracts supposed to be embraced within the terms of the deed was made.

The covenant following the above recited description as to what was embraced in the conveyance is as follows:

"And it being hereby expressly declared and covenanted by said grantor [the county] that all the lands contained in said schedule are actually the property of said Scott county at the date of this deed, and that she has a good right to sell and convey the same."

It is on that covenant this suit is founded. The main inquiry is whether that covenant, taken in connection with the

terms of the deed, covered lands other than those belonging to the county, situate within the county, being swamp and overflowed lands. To hold that the covenant extended as far as plaintiff claims would be to disregard the obvious scope and extent of the deed.

Demurrer is sustained.

PARSONS *v.* DENIS and others.

(Eastern District of Missouri. January, 1881.)

1. CONSTRUCTION OF STATUTE — MORTGAGE A DEED. — A mortgage is a deed within the meaning of the Missouri statutes (R. S. § 699), which provides that "a husband and wife may convey the real estate of the wife, and the wife may relinquish her dower in the real estate of her husband, by their joint deed." Therefore, under said provision, a married woman may mortgage her separate property when her husband joins with her.
2. PRACTICE — EQUITABLE DEFENSES IN ACTIONS AT LAW. — Equitable defenses are inadmissible in actions at law in United States courts. State practice does not affect the rule.
3. SAME — SETTING UP COLLUSIVE TRANSFER. — The proper way to set up a collusive transfer, in fraud of jurisdiction, is by plea in abatement, and not by answer.

Demurrer to answer.

Henry A. Cunningham, for plaintiff.

Finkelnburg & Rassieur, for defendant.

TREAT, *District Judge.* — This is an action of ejectment in the ordinary form. To it several defenses affirmatively are interposed. To all of those special defenses except one a demurrer is presented:

1. The first defense is substantially that a married woman cannot mortgage her estate (her husband joining) to secure the payment of his debts.

Reference is made to the Missouri statutes on this subject,

as changed from time to time, and to the precise meaning of the term "deed," it being contended that even if a married woman could convey absolutely (her husband joining) she could not mortgage. The distinction attempted to be drawn from the doctrine of mortgages is a subtle one; but, in the opinion of the court, a mortgage is a deed, within the meaning of the statute, and operative as such. Hence, the demurrer as to said defense is well taken.

2. The second defense is as to the inadequacy of the price at which the property was sold under foreclosure.

Equitable defenses, though admissible under the state practice, are not admissible in United States courts.

3. The third defense stated is that the same cause of action pending is before the supreme court of Missouri, during the pendency of which a transfer of the alleged title was made to this plaintiff.

If the allegations were of a collusive transfer, in fraud of jurisdiction, that question, it is contended, should be raised in abatement. Even if that were the rule, strictly, the averment is not sufficient to raise the question. It is not averred that there was a *collusive* transfer, or that the plaintiff was not, at institution of this suit, the owner in fee.

The demurrer is sustained.

Adams *v.* Meyrose.

(Eastern District of Missouri. May, 1881.)

1. Infringement of Patent — Forfeiture of License.— Where the owner of a patent licenses any one to manufacture and sell the patented article, and the license is upon express condition that it shall become void upon failure on the part of the licensee to pay a specified royalty to the licensor, and it is agreed that after breach of condition by the licensee he may be treated as an infringer of the patent if he continues to manufacture or sell the patented article, *held*, that the licensee cannot be treated by the licensor as an infringer, and sued as such in a court of equity, for continuing to manufacture and sell the patented article after breach of con-

dition, and notice to him from the licensor that he claims a forfeiture of the license.

2. SAME — REMEDIES.— Under circumstances such as are above set forth the owner of the patent may bring his action at law and establish his royalty and recover what is due, or file a bill in chancery and have the license annulled. *Hartell* v. *Tilghman*, 99 U. S. 547.

In equity.

This is a suit to charge defendants as infringers of a patent.

The bill alleges that complainant is a citizen of Illinois, and that defendants are citizens of Missouri; that complainant is the owner of a patent on an improved lantern; that he licensed defendants to manufacture such lanterns in St. Louis, and sell them throughout the United States, during the life of complainant's patent; that defendants agreed to pay a specified royalty; that the license was upon condition "that if said parties of the second part (defendants) shall fail to keep and perform any of the covenants and agreements herein contained, for ten days after notice in writing specifying said default, or shall neglect or refuse to make returns, or to make payments for twenty days after the times therefor above specified, the license herein granted shall become null and void, and all rights to use any of said improvements shall be forfeited, and the party of the first part (complainant) may treat them as infringers for any manufacture or sale of said improvements after such forfeiture, and thereupon the parties of the second part shall have no further rights or privileges under this agreement, but shall still remain bound thereby as to all covenants and agreements herein contained, and shall not thereby be discharged from any liability to the party of the first part for any license fees previously accrued." The bill further alleged that defendants failed to pay royalty as agreed, and have not paid any royalty since February 14, 1880; that, upon the failure of defendants to pay said royalty, complainant caused them to be notified that the contract and license would, after the date of the notice, be null and void, in consequence of said breach on the part of defendants; and that defendants, after receiving said notice, continued to make,

vend, etc., improved lanterns covered by complainant's patent. Wherefore complainant prayed that defendants be decreed to account for and pay over to him all gains and profits realized by them from making, using or vending lanterns having the improvements described in his letters patent, and for damages, and a preliminary and perpetual injunction.

The defendants in their answer admit the validity of complainant's patent, and that they have been licensed as claimed, but deny that there has been any breach of condition on their part, or that the said license is not still in force, and allege a breach on the part of complainant.

Noble & Orrick, for complainant.

Edward J. O'Brien, for defendant.

TREAT, *District Judge.*— The case of *Hartell* v. *Tilghman*, 99 U. S. 547, is conclusive of this case. The plaintiff seeks to charge the defendants as infringers of the patent, despite the contract of license, in consequence of non-compliance with its terms. At first it seemed clear, under the contract, that the suit was well founded; but as the majority of the United States supreme court have taken an adverse view, nothing remains for this court but to dismiss this bill, and remit the plaintiff to the remedies indicated in that decision.

Bill dismissed, without prejudice.

EATON *v.* ST. LOUIS SHAKSPEAR MINING & SMELTING CO. and others.

(Eastern District of Missouri. March, 1881.)

1. CORPORATION — JURISDICTION — CITIZENSHIP.— A corporation is, for jurisdictional purposes, to be regarded as a citizen of the state under the laws of which it is organized.
2. FOREIGN CORPORATIONS — SERVICE OF PROCESS.— Where, by the local law, a foreign corporation is amenable to suit in the courts of the state,

service being made upon an agent within the state, the federal courts may be regarded as courts of the state, and may take jurisdiction upon such service as would be good in a state court.

3. SAME — JURISDICTION.— A federal court has no jurisdiction over a foreign corporation, in the absence of local law conferring jurisdiction on the state courts, though the corporation does business through an agent and has an office within the district where the court is held.
4. SAME — CONSTRUCTION OF STATUTE.— Under the Revised Statutes of Missouri, which provide (section 3489) that "a summons shall be executed, except as otherwise provided by law: * * * *fourth*, where defendant is a corporation or joint-stock company, organized under the laws of any other state or country, and having an office or doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business; or, if it have no office or place of business, then to any officer or agent or employee in any county where such service may be obtained." *Held*, that as the St. Louis court of appeals has decided, in a case now before the supreme court of the state, that the above statute does not enlarge the jurisdiction of the state courts, nor authorize suits *in personam* therein against foreign corporations in cases not coming within the laws previously in force, but simply provides a substitute for constructive notice in a proceeding against such corporations, that the ruling of said court of appeals should be followed by United States courts, unless it is overruled by the supreme court of Missouri.

In equity. On motion to dismiss for want of jurisdiction.

The respondent, the St. Louis Shakspear Mining & Smelting Company, is a corporation organized under the laws of Illinois, and by its charter its principal office is declared to be in the city of East St. Louis, in the county of St. Clair, and state of Illinois. The bill alleges that all the stockholders and officers of the corporation were, at the time of the organization of the company, and still are, citizens of Missouri and residents of the city of St. Louis. The complainant claims to be a creditor of this corporation in the sum of $3,180, and brings this suit to compel the several stockholders to contribute ratably to the payment and satisfaction thereof. The bill contains the following averment:

"Complainant further states that this corporation respondent has ceased doing business, leaving the debt aforesaid due and unpaid; that it has no office or agent in the city of East

St. Louis, nor in the state of Illinois, nor is there any property anywhere belonging to said corporation out of which said debt, or any part of it, can be made."

The marshal's return as to service of summons on the corporation is as follows:

"I have executed this writ by delivering a copy thereof, together with the petition thereto attached, to Lorenzo Brown, secretary of the within named. St. Louis Shakspear Mining & Smelting Company, at the office of the secretary of said company, at 603 Washington avenue, in the city of St. Louis, in said district, on the fourteenth day of February, 1881, he being in charge of said office, and I being unable to find the president or other chief officer of said company in said district."

The motion is to dismiss upon the ground that it appears from the record that the corporation respondent is neither a citizen of nor found in the district, within the meaning of the act of congress defining the jurisdiction of the circuit court of the United States, approved March 3, 1875.

Wickham & Robertson, for motion.

Dyer & Ellis, for complainant.

McCrary, *Circuit Judge.*—The respondent corporation was organized, under the law of Illinois, to carry on the business of mining, and is for jurisdictional purposes to be regarded as a citizen of that state. The motion to dismiss being before us for consideration, the important question is, whether such a foreign corporation can be sued in this court upon the ground that it has an office in the city of St. Louis for the transaction of its business, and upon service made at such office upon its secretary. We construe the return as showing that service was made upon the secretary at the office of the company in the city of St. Louis. The general question of the right of a creditor of a foreign corporation to sue such corporation in a federal court of any district in which it may have an office, and an officer or agent for the transaction of its general busi-

ness, has been considered in the following, among other cases: *Railway Co.* v. *Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369; *Hayden* v. *Androscoggin Mills*, 1 Fed. Rep. 93; *Runkle* v. *Ins. Co.* 2 Fed. Rep. 9; *Brownell* v. *R. Co.* 3 Fed. Rep. 761; *Williams* v. *Transp. Co.* 14 Off. Gaz. 523; *Wilson Packing Co.* v. *Hunter*, 7 Reporter (Boston), 455.

Railway Co. v. *Harris* was a suit brought in the supreme court of the District of Columbia against the Baltimore & Ohio Railroad Company, a Maryland corporation. It was held that the corporation was *found* within the District of Columbia. The act of congress, upon the construction of which the question was decided, authorized the company to build a branch road into the District of Columbia, and provided as follows:

"And the said Baltimore & Ohio Railway Company are hereby authorized to exercise the same powers, rights and privileges, and shall be subject to the same restrictions, in the construction and extension of said lateral road into and within said district, as they may exercise or be subject to under or by virtue of the said act of incorporation, in the extension and construction of any railroad within the state of Maryland, and shall be entitled to the same rights, benefits and immunities in the use of said road, and in regard thereto, as are provided in said charter, except the right to construct any lateral road or roads in said district from said lateral road."

It was held that under this act, while there was but one corporation in Maryland and the District of Columbia, there was a unity of ownership throughout, and that the corporation might be sued in the District of Columbia for injuries done on its road outside of said district.

In *Ex parte Schollenberger* the facts were:

That a foreign corporation was transacting business in Pennsylvania under a statute which provided that the company should file a written stipulation agreeing that process issued in any suit brought in any court of the commonwealth having jurisdiction of the subject-matter, and served upon an agent

specified by the company to receive service of process for it, should have the same effect as if personally served upon the company within the state.

It was held in this case that a corporation may consent to be sued in a foreign state in consideration of its being permitted to carry on its business there, and accordingly it was held that such a corporation, doing business in Pennsylvania under said statute, was found there within the meaning of the act of congress. The decision is put distinctly upon the ground that the law of the state required foreign corporations to consent to be "found" there as a condition precedent to their being permitted to transact business in the state, and that the company in that case had so consented. These are the latest adjudications of the supreme court upon the subject.

In *Hayden* v. *Androscoggin Mills*, in the circuit court for the district of Massachusetts, Lowell, C. J., went further, and held that, independently of any local statute, a trading corporation is of right suable in a country in which it transacts an important part of its business.

Runkle v. *Ins. Co.* is in all respects like the case of *Ex parte Schollenberger*, and was decided upon the authority of that case, and under a similar statute.

In *Wilson Packing Co.* v. *Hunter* it was held by Drummond, C. J., that a Missouri corporation, owning and possessing a slaughter-house and stock-yard in East St. Louis, Illinois, where beef to be canned by said company was slaughtered and dressed for and in the name of the company, could be sued in the circuit court of the United States for the southern district of Illinois. The liability of such a corporation to be sued in Illinois it was held might be inferred from its right to do business in that state, although there was no express provision of law authorizing service upon it within that state.

In *Williams* v. *Transportation Co.*, in the United States circuit court for the eastern district of New Jersey, it was held that a foreign corporation, without charter from a state, but transacting business therein and amenable to process of its

courts in accordance with local law, is *found* within the state in the sense of the judiciary acts, and may be sued in the United States circuit court.

It will be seen by an examination of these and other cases, that, according to the great weight of authority, the most that can be claimed in favor of the jurisdiction of federal courts is, that where, by the local law, the foreign corporation is amenable to suit in the courts of the state, service being made upon an agent within the state, the federal courts may be regarded as courts of the state, and may take jurisdiction upon such service as would be good in a state court. At all events, we are unwilling to go further than this. We do not agree to the proposition that the mere fact that a foreign corporation does business within the district brings it within our jurisdiction, in the absence of a local law which authorizes service of the process of the state courts upon it. The state and federal courts, upon a question such as this, should be governed by the same rule, to the end that citizens litigating their rights in the two forums shall stand upon an equality.

It becomes necessary, therefore, to consider the legislation of this state upon the subject. There is no statute in Missouri requiring foreign corporations in general, transacting business in this state, to subject themselves to the jurisdiction of its courts. The Revised Statutes of 1855 contained a provision as follows:

"Any corporation, incorporated by any other state or country, and having property in this state, shall be liable to be sued, and the property of the same shall be subject to attachment in the same manner, as individual residents of other states and countries, having property, are now liable to be sued and their property subject to attachment." R. S. 1855, ch. 34, § 22. By act approved March 14, 1859, it was provided: "That all railroad companies who own and operate roads terminating opposite to the city of St. Louis, whose chief office or place of business is in St. Louis, shall be sued in the

same manner, and no other, that railroad companies chartered by the laws of this state are now sued." Acts 1859, p. 67.

These provisions were embodied in the revision of 1865, ch. 22, § 17. By an act passed in 1877 it was provided as follows: "All railroad corporations that own or operate roads terminating opposite to any point in this state, and which have offices or places of business in this state, shall be sued in the same manner as railroad corporations chartered by this state." Laws 1877, p. 369.

Similar statutes have from time to time been enacted with reference to foreign insurance companies, but none in general terms applying to all foreign corporations. Another statute, and the one chiefly relied on by complainant, provides as follows: "A summons shall be executed, except as otherwise provided by law: * * * *fourth*, where defendant is a corporation or joint-stock company, organized under the laws of any other state or country, and having an office or doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business; or, if it have no office or place of business, then to any officer, agent or employee, in any county where such service may be obtained."

It has been held by the supreme court of Missouri, that under the above-mentioned act of March 14, 1859, foreign railroad companies were not liable to be sued in the courts of this state without an attachment of property, unless in the case of a company owning a railroad terminating opposite the city of St. Louis, and having its chief office for the transaction of its business in that city. *Robb* v. *Railroad Co.* 47 Mo. 540, and cases cited. This was held upon the principle that a statute specifying what particular foreign corporations may be sued in this state necessarily excludes suits against such as are not included within the terms of the law. The later act enlarges the right of suit by extending it to railroad companies having lines of road terminating opposite to *any*

point in this state, and which have an office or place of business in this state, whether it be its *chief* office or not; but it still applies only to railroad corporations.

It is thus seen that the action in the present case could not be maintained in a state court, under the decisions of the supreme court of Missouri, in the absence of the last statute above quoted. The question then is, does that statute enlarge the jurisdiction of the courts of the state, and authorize suits *in personam* therein against foreign corporations, in cases not coming within the laws previously in force? It will be observed that it is a statute regulating the service of summons upon a foreign corporation. The natural construction of such a statute is that it is intended to regulate service of process in such cases as are authorized by law to be brought — in such cases as come within the jurisdiction of the court; not that it is intended to confer jurisdiction in cases not covered by previous legislation. It is strongly urged by counsel that the act was intended by the legislature to go further, and to authorize suits to be brought against all foreign corporations having offices and agents in this state, and it is said that great inconvenience will result from any other construction. We recognize the fact that it is important that laws should be enacted authorizing suits against corporations wherever they are found doing business; but it must also be conceded that it is the duty of the legislature, and not that of the courts, to make such laws. If the statute of Missouri as it now stands, and being fairly construed, does not authorize such suits to be brought in the courts of the state, we are not disposed to assert the jurisdiction of this court. Although the supreme court of this state has not passed upon the question of the true construction of the act last mentioned, it has received the careful consideration of the St. Louis court of appeals, in the recent case of *McNichol* v. *The U. S. Mercantile Reporting Agency*, where, in a well-reasoned opinion, it is held that the statute does not authorize suits against *all* foreign corporations doing business in this state. It is held that the several acts

must be construed together; that they are not necessarily in conflict, and that it is the duty of the courts to give full effect to each; and it is said:

"The clause in question is perfectly consistent in terms with section 742. The latter section prescribes in exact terms what right of action shall exist against foreign corporations. The section under consideration goes no further than to prescribe the manner in which process shall be served on such corporations. It says nothing about the effect of such service; that is left subject to the operation of other provisions of the Revised Statutes, and under those provisions it can have no more operation than as a substitute for constructive notice in a proceeding against a non-resident individual."

For the present, and until the question shall be decided by the supreme court of Missouri, we shall adopt and follow this ruling. As, however, the case just cited is now, as we understand, pending on appeal in the supreme court of the state, the complainant may, if he see fit, have this case continued until that court shall give an authoritative construction to the statute, which will be adopted by us as the rule of decision here. If complainant does not adopt this suggestion the motion to dismiss will be sustained.

GILES *v.* LITTLE.

(District of Nebraska. January, 1881.)

1. WILL — CONSTRUCTION — POWER OF DISPOSAL COUPLED WITH DEVISE OF CONDITIONAL INTEREST.— Jacob Dawson disposed of all his property by will, as follows: "After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to be and remain hers with full power, right and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow; upon the express condition, however, that if she should marry again, then it is my will that all the estate herein bequeathed, or

whatever may remain, should go to my surviving children, share and share alike; and in case any of my children should have deceased, leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute and appoint my said wife, Edith J., to be executrix of this my last will and testament, hereby revoking all former wills made by me." *Held* that, construing all the clauses of the will together, it conferred upon the devisee power to convey the fee of the premises at any time during her widowhood.

On demurrer to petition.

Action of ejectment to recover two lots in the city of Lincoln.

Jacob Dawson, who was, at the time of making his will, and at the time of his death, the owner in fee of the lots, disposed of them by will as follows:

"After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to remain and be hers, with full power, right and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow; upon the express condition, that, if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike; and in case any of my children should have deceased, leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute and appoint my said wife, Edith J., to be the executrix of this my last will and testament."

On the twenty-second of June, 1869, the said Jacob died in Nebraska, leaving surviving him the said Edith J., his widow, and six children.

On the twenty-seventh day of April, 1870, the said Edith J. Dawson conveyed the premises in controversy to one Cody, under whom, through certain mesne conveyances, the defendant claims.

On or about the fifteenth of November, 1879, the said Edith intermarried.

On the fifteenth of September, 1879, the surviving heirs conveyed the premises in controversy to one Burr and one Wheeler, under whom the plaintiff claims.

J. M. Woolworth, for plaintiff, cited 4 Kent, *537; 1 Redfield on Wills, 420; *Cole* v. *Rawlinson*, 5 Ld. Rag. 831; *Boon* v. *Cornforth*, Ves. Sr. 277, 279; *Pond* v. *Bery*, 10 Paige, 140, 152; *Chryslie* v. *Phyfe*, 19 N. Y. 344, 348; *Smith* v. *Bell*, 6 Peters, 68; *Clark* v. *Boorman's Executors*, 18 Wall. 493; *Blake* v. *Hawkins*, 98 U. S. 315; *Allen's Ex'rs* v. *Allen*, 18 How. 391; *Brant* v. *Virginia, etc. Co.* 93 U. S. 326; *Boyd* v. *Strahan*, 36 Ill. 355; *Frazier* v. *Hussey*, 43 Ind. 310; *Seigwalt* v. *Seigwalt*, 37 Ill. 430; *Dunning* v. *Vandusen*, 47 Ind. 422; *Jones* v. *Wood*, 16 Pa. St. 25; *Owen* v. *Switzer*, 51 Mo. 322; *Fowler* v. *Fisher*, 77 N. C. 437.

Marquett, Deweese & Hall, for defendant, cited *Weir* v. *Michigan Stove Co.* Supreme Court Michigan, October, 1880; *Berkert* v. *Jacoby*, 36 Iowa, 274; *King* v. *Ackerman*, 2 Blackf. 415; *Leiter* v. *Shepherd*, 85 Ill. 247; *Dodge* v. *Moore*, 100 Mass. 335; *Jones* v. *Bacon*, 68 Me. 34; *Murfitt et al.* v. *Jessup*, 94 Ill. 158; *Brownfield* v. *Wilson*, 78 Ill. 470; 1 Redfield on Wills, 443, 450.

McCRARY, *Circuit Judge.*— Was Edith J. Dawson empowered by the will of Jacob Dawson to convey the fee of the premises? The answer to this question depends upon the construction of the will.

In its determination very little assistance can be derived from the consideration of adjudicated cases, since testamentary conveyances, unlike most others, present an endless variety of form and expression, and each must be construed very largely by a consideration of its own language and circumstances.

We have found great difficulty in arriving at a satisfactory conclusion as to the true construction of the will now under consideration, but upon the best consideration we are able to give it, we hold that the widow was authorized to convey the fee, and that the judgment must therefore be for the defendant. We base this conclusion upon the following considerations:

1. This construction is, we think, the only one by which we can give effect to the very comprehensive terms in which the bequest is expressed, to wit: "To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, *the same to remain and be hers, with full power, right and authority to dispose of the same as to her shall seem meet and proper*, so long as she shall remain my widow." The whole property was to be hers. The power of disposal was given by words well chosen to express the most unlimited control. The whole instrument must be construed together, and the words just quoted must have their ordinary meaning except in so far as they are controlled by the other terms employed. The concluding words in the above quotation, "so long as she shall remain my widow," do not restrain or limit the *power* of disposal, but only the *time* of its exercise. The devisee had unlimited power to dispose of any or all the property bequeathed, provided she exercised it during her widowhood.

2. The condition can have full effect by giving the whole instrument the meaning above stated. The words are, "Upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, shall go to my surviving children, share and share alike." If the language here employed had been such as to convey the idea that the estate bequeathed was to remain for the children, it would have greatly strengthened the position of plaintiff. But on the contrary the language used clearly shows that the testator contemplated the possibility, at least, that the widow might, under her unlimited power of disposal

during widowhood, sell and convey a part or all of the property, and hence in case of her marriage the children were to receive the estate bequeathed, "or whatever shall remain." It is only by conceding the power of disposal as to part that we can conceive of a remainder, and if she had power to dispose of a part, she had power to dispose of all. Her control was precisely the same over every part of the estate.

3. The construction we have adopted is the only one that will give effect to every clause of the will. As we have seen, no other construction is consistent with the terms of the first clause of the will, which declares the property hers with power to dispose of it as to her shall seem meet and proper. To hold that she took only an estate for years with power to dispose of no more, would be to nullify so much of the instrument as gave her the property "with power, right and authority to dispose of the same as to her shall seem meet and proper." The construction contended for by plaintiff is also inconsistent with some of the language used in the condition, while that we have adopted will give effect to all the clauses. Unless we hold that the power of disposal was conferred upon the widow by the will, we can give no meaning or effect to that clause in the condition which gives to the children, in case of the marriage of the widow, the estate bequeathed "or whatever may remain." As already suggested, this implies that a part may be disposed of, and proceeds upon the theory that there was a power of disposal given by the will. It is insisted that the words, "or whatever may remain," apply only to the personal estate; but an examination of the terms of the instrument will show that there is no room for this construction. It is "the estate herein bequeathed," whether real or personal, or both, "or whatever may remain;" that is, whatever may remain of the estate, that is to go to the children. By recognizing the power of disposal, we can give meaning to this clause, and in no other way can it have any meaning or effect.

4. The construction we adopt seems to us the most reasonable. The power to sell the widow's interest during her

widowhood would have been so uncertain as to the extent of the interest to be conveyed as to be almost valueless. A title which could be ended the day after it was given by the marriage of the grantor would be too uncertain to be of any value. It is scarcely conceivable that the testator would have been so careful to employ the well chosen words found in the will giving the widow such unlimited discretion as to the disposal of the estate, if he had intended only to empower her to convey an interest that might be at any moment defeated by her marriage.

5. The statute of Nebraska, according to which the will must be construed, provides as follows:

General Statutes, p. 300, sec. 124: "Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate."

This statute clearly requires that construction of the will which favors the theory that the whole estate was transferred thereby.

The demurrer to the petition is sustained, and if plaintiff stands upon his petition, there will be judgment for defendant.

MILLER and others *v.* THE LIGGETT & MYERS TOBACCO CO.

(Eastern District of Missouri. January, 1881.)

1. ESTOPPEL — JUDGMENT.— A party is bound by an adjudication where he has all the ordinary rights of a litigant with respect to such adjudication.
2. SAME — SAME.— A party who contributes money for the purpose of employing counsel, and carrying on a litigation, under a contract with a party to the record, has the right to take such action in the case as will protect his interests in such litigation.
3. SAME — SAME — PRACTICE.— The validity of a patent having been in part sustained in one circuit, suit was brought in another circuit for infringement, by a party who had contributed to the payment of the counsel who had defended the first suit. *Held*, that the defendant was estopped by the

adjudication in the other circuit, but that the court would not enter any decree based upon that opinion until the conclusion of the litigation in such other circuit.

4. PRACTICE — PRIOR USE. — Evidence of prior use having been introduced in the latter suit, *held*, that the proper way to proceed would be by motion for a rehearing in the other circuit.

In equity.

A suit having been brought against Foree & Co., tobacco manufacturers, at Louisville, for infringing the Miller & Worley patent, re-issue No. 8060, for "finishing tobacco plugs," said patent having two claims — one for the process and one for the product — these defendants, with some dozen other tobacco manufacturers, issued a circular to their customers promising to protect them against any suit Miller & Worley might bring against them for dealing in the subscriber's tobacco. It further appeared that the above defendants contributed to the payment of counsel who defended the Foree case, but in all other respects were entirely independent of, and had no connection whatever with, Foree & Co. The evidence showed also that their process was in many essentials different from that practiced by Foree & Co. The product claim was held void. Much new evidence, as anticipating the process, was introduced in this case by both sides, and the case set down for final hearing.

Stem & Peck, *Beattie & Winchester* and *George Harding*, for complainants.

Samuel S. Boyd, for defendant.

MCCRARY, *Circuit Judge (orally)*. — We have considered the case of *Miller* v. *The Leggett & Myers Tobacco Co.* so far as the question of estoppel is concerned. The suit is brought to determine the validity of certain letters patent belonging to these plaintiffs. The same question was involved in the case of *Miller* v. *Foree*, tried in the district of Kentucky, in which there was a decree sustaining the validity of the patent in so

far as the first claim is concerned, and, as the patentee has waived anything beyond that claim, that decree sustains the claim of the validity of the patent, so far as it is involved in this litigation. The Leggett & Myers Tobacco Company was not a party to the record in that case, and the question is whether it was privy to that proceeding in such a sense as to be bound by it and estopped by the decree. The rule upon the subject of estoppel is, of course, well understood by counsel. It is, to state it generally, that parties and privies are concluded by the judgment. But I am of the opinion that a person, to be concluded by a judgment, must be privy to the proceeding in such a sense that he may control the litigation in so far as making motions in the case, offering evidence, cross-examining witnesses or taking an appeal is concerned; that is, it is not reasonable to say that a man shall be bound by an adjudication, unless he has all the ordinary rights of a litigant with respect to the adjudication.

The question, therefore, is whether it appears, from the proof before us in this case, that the Leggett & Myers Tobacco Company had the authority to control that litigation, within the sense of the rule as I have explained it, and also whether they have now the right to go into that court, and, if the time is not out, move for a rehearing or for an appeal, if there has been a final decree, and, if there has not been a final decree, whether they have the right, when one is rendered, to appear there and take an appeal. I think that a party who contributes money for the purpose of employing counsel, and carrying on a litigation, under a contract with a party to the record, must of necessity be held to have the right to take such action in the case as will protect his own interest in it. As, for example, suppose there is a case, which is understood to be a test case, involving the validity of a patent, or anything else, against a particular individual, but involving a subject-matter concerning which a large number of other persons are equally interested with the particular defendant in that case, and suppose all the parties who are interested, or a number of them,

come together, enter into a contract that they will raise a fund to carry on that litigation, that they will unite for the purpose of employing counsel, and combine to carry it on in the name of the party to the record, it seems to me that the persons who, under such a contract as that, actually contribute money for the purpose of carrying on a suit, are authorized to go into that court and use the name of the party to the record in making such motions and taking such steps as are necessary for the protection of their particular interest in it. In other words, I suppose that, under the agreement which appears in this case, Mr. Boyd, who represents the defendant in that suit, can appear in that court and move for a rehearing, and can appear there in the name of the defendant in that case and take an appeal.

The language of the circular, which was signed by these defendants, with others, is that counsel have been retained by them to "attend to all such suits;" that is, all suits involving the validity of this patent. The testimony shows that the defendants in this case have, in pursuance of this very agreement, contributed money to carry on that case in Kentucky. It may be, however, that the court in Kentucky might take a different view of that question from what we do. We cannot decide for that court, and, of course, the decision of that court would be conclusive and final upon the parties. If the counsel for these defendants should appear in that court and should move for leave to appeal, and if that court should deny them that right, they might be without remedy if we were now, upon this question, to finally adjudicate this case; consequently we are of the opinion that this case ought to stand upon this docket without any final adjudication until you have concluded that litigation in Kentucky. You can take that case to the supreme court, and when the supreme court has decided these questions that will be conclusive upon all parties. There is no necessity, as we think, for experimenting with all the circuit court judges in the country when you have one case which can be taken to the supreme court, and

the law of the controversy be there determined. In order, however, to protect the rights of the defendants as fully as possible, we propose to make no decree in this case at present, but to continue it until we know what has been the result of that case; and, if it goes to the supreme court, until you have an adjudication by that court. If we were to decide the question now, we would say that these defendants are clearly estopped upon the evidence that is before us; but, as it is possible there might be a different decision by the court in Kentucky, we do not propose to render any decree at present based upon the opinion which we hold. We do propose, however, to say to counsel here that they must go on with that case in Kentucky, bring it to a final decree, take it to the supreme court, and have the law of the case finally settled by that tribunal, unless they are estopped from doing so by some decision there; and we will take no further steps until you have done so.

Mr. Boyd.—If your honor will pardon me, in regard to the course which your honor suggests there is one practical difficulty, which may render it impossible for us to get our rights there, and that is this: Your honor very well knows that in these motions for rehearing it is necessary that the parties should show and satisfy the court that as soon as the evidence came to their notice it was brought there by a motion for rehearing. Now, as a matter of fact, this evidence did not come to the knowledge of any party until after that decree was rendered; but, as your honor will see, since this answer was set up nearly a year's time has elapsed. My object in bringing it up in this way, and not making a motion there, was, that I supposed it would be fairer to the other side, that, instead of going before that court on *ex parte* affidavits for a rehearing, we might take the testimony, giving them the right of cross-examination, and that they might have the like right to introduce evidence to meet this new matter. Therefore, if it should turn out that his honor, Judge Baxter, should hold that, inasmuch as this time has elapsed, and this excuse

which I now present should not be held by him to be sufficient to introduce this new testimony, and that case were appealed, it would go to the supreme court without this new testimony, which we think is vital, and as to which there was not even a hint or suggestion in the record as it now stands before Judge Baxter.

Judge McCrary.— We will of course be just as much at liberty after you have settled that case to act on this as we are now, so that you waive nothing in that respect. I say that the principal question in the case, or one very important question, is as to the patentability of this particular improvement, and that you have fairly and fully raised, as I understand, in the case decided by Judge Baxter.

Mr. Boyd.— Not as fully as it is now raised, because there is this proof of a prior use which went to the whole extent.

Judge Treat.— It is not a question as to use, but as to patentability; whether it is a matter that is within the purview of the patent law anyhow.

Mr. Boyd.— Yes, sir; but still we do not like to go to the supreme court simply upon that, inasmuch as since that time we have found this evidence, which we think, even if it was patentable, shows a prior use. I propose, then, to make a motion for rehearing there, as your honor suggests.

Judge McCrary.— I think that will be the proper way to proceed.

Earnest *v.* Stoller & Hill.

(District of Colorado. March, 1879.)

1. Custom — Agency — Right to Choose Either of Several Customary Methods.— Defendants were directed to place certain money to plaintiff's credit in the Exchange Bank of Denver, and in order to comply were obliged to transmit the money from Kansas City, Missouri, to Denver. *Held*, that defendants had the right to transmit the money by some usual and ordinary method recognized among business men as proper for that purpose; and where there were several methods of transmitting money

between those points, equally in use among business men, and safe, serviceable and economical, they might choose either.

2. SAME — USAGE AS TO TRANSMITTING MONEY.— A custom or usage as to transmitting money from one place to another, as from Kansas City, Missouri, to Denver, Colorado, cannot be so unless it extends to the place to which the money is to be sent as well as to that place from which it is sent.

Action to recover money. The facts appear in the opinion.

HALLETT, *District Judge.*— Defendants are engaged in the business of selling live stock at Kansas City, in the state of Missouri.

In July last plaintiff consigned to them from Deer Trail, in this state, ten car loads of cattle to be sold for his account.

The cattle arrived at Kansas City on the twenty-sixth day of July and were immediately forwarded to Brown, Price & Co., of Chicago, who sold them and remitted the proceeds to defendants at Kansas City by draft on New York.

This draft, amounting to $3,771.65, was received by defendants at Kansas City in the morning of the first day of August, and was by them deposited to their own credit in the Mastin Bank at that place. Deducting a small sum due to them for charges on the cattle, defendants at the same time drew a check on the bank for the sum due to plaintiff, $3,757.56, as the net return from the sale of the cattle, and took in exchange for the check a deposit slip in the following form:

THE MASTIN BANK,
Kansas City, Mo., 7, 31, 1878.

EXCHANGE BANK, Denver, Colo.:

Your account has credit thirty-seven hundred and fifty-seven and 56-100 dollars. Deposited by Stoller & Hill for the use of F. P. Earnest.

$3,757.56. Very Respectfully,
JOHN J. MASTIN, Cashier.
Per J. A. BOARMAN, Teller.

This certificate was issued in duplicate and one copy delivered to defendants, and by them sent by mail to plaintiff at Deer Trail, where it was received on the third day of August.

According to the course of business as claimed by defendants, the Mastin Bank should have sent the other copy by the next mail to the Exchange Bank of Denver; but this apparently was omitted, as the officers of the latter bank testify that they did not receive it until some time after the Mastin Bank suspended, and then notice of the credit was sent by the receiver of the bank.

The date as given in the certificate, July 31, is shown to be incorrect. It was issued on the first day of August and the credit was not entered on the books of the bank until the next day. On the third day of August, 1878, the Mastin Bank was not opened for business, and from thence hitherto it has been wholly insolvent, so that the sum so deposited by defendants has not been received by the Exchange Bank nor by the plaintiff. It is claimed by defendants that the money was deposited in the Mastin Bank in compliance with instructions from plaintiff to place the amount to his credit in the Exchange Bank of Denver.

As to the instructions given relating to the proceeds of the sale and all the facts hereinbefore mentioned, there is no controversy.

At an interview between the plaintiff and defendant Stoller, which took place at Kansas City about the time the cattle arrived at that place, defendants were directed to place the money received from the cattle to plaintiff's credit in the Exchange Bank of Denver. Both parties agree in this statement, and also in saying that no direction was asked or given in respect to the manner of transmitting the money to the Exchange Bank. Considered by itself, the instruction given by plaintiff to defendants imports nothing more than the substitution of the Exchange Bank of Denver for himself as the party to whom the money was to be sent.

But defendants contend that it has a peculiar significance when taken in connection with a custom or usage universally recognized by cattle dealers at Kansas City, and well known to all persons dealing with them, by which money is remitted

to banks in other places in the way and manner adopted by defendants in this instance.

By this usage the factor is required to deposit in some bank at Kansas City the proceeds of any consignment that may be made to him to the credit of the bank to which the remittance is to be made, and to forward to his customer one of the slips issued by the bank at Kansas City attesting such deposit. With that, it is said, his duty ends; and if any loss occurs, it must fall on the principal rather than the agent.

From the evidence given at the trial it seems that the usage is not recognized by all of the dealers in cattle at the Kansas City stock yards, but perhaps it is sufficiently shown that the course pursued by defendants was recognized amongst such dealers at that place as a method of transmitting money to distant places. Four out of thirteen or fifteen firms engaged in that business at the stock yards near Kansas City were in the habit of remitting money in that way, and the officers of the First National Bank, formerly in business there, and of the Mastin Bank, testify that the practice was general.

The direction to defendants to place the money to plaintiff's credit in the Exchange Bank of Denver required them to transmit the money to that bank in some usual and ordinary method, recognized amongst business men as proper for that purpose; and if there are several methods of transmitting money from Kansas City to Denver, equally in use amongst business men, and safe, serviceable and economical, no reason is perceived for saying that defendants were bound to adopt one such method more than another. From what we know of business in the country at large, although no evidence was given on that point, we may assume that if the money had been sent by express, or by bill of exchange on New York, the risk of loss *in transitu* would have been with the plaintiff.

Choosing fairly between known and recognized methods of sending the money as directed by plaintiff, defendants would not be held responsible for an error in judgment, or for any misfortune to which they had not contributed. Wharton's

Agency, § 248; *Chandler* v. *Hogle*, 58 Ill. 56. And so we may say that if the method adopted by defendants for transmitting the money to the Exchange Bank was in use amongst business men in Kansas City and Denver, they cannot be chargeable with negligence or omission of duty to their principal in resorting to it.

But when we consider attentively the nature of the alleged usage, we find that it is not shown to be of sufficient extent to embrace the subject of this controversy. It is said to be a method of transmitting money from one city to another, but it cannot be such unless it extends to the place to which the money is to be sent as well as to that from which it is started. It must be a usage between the bankers in Kansas City and the bankers in Denver, or between the Mastin Bank and the Exchange Bank of Denver, to be effective in any way. According to the alleged usage, the effective act in transferring the funds from Kansas City to Denver was to be performed by the Denver Bank.

Money was deposited in Kansas City to the credit of the Denver Bank, and of course it would remain there until the bank should draw for it or get it in some other way.

In other words, defendants were instructed to send the money to the Exchange Bank of Denver, and instead of complying with that instruction they placed it in the Mastin Bank at Kansas City, and invited the former to come to Kansas City and get it, or send for it, as would best suit its convenience. If by force of some general usage between the banks named or between the banks in Kansas City and the banks in Denver, or some special agreement, authority had been conferred on the Mastin Bank to receive deposits for the Exchange Bank, the position assumed by defendants would be more tenable. But nothing of that kind was shown.

The Exchange Bank did not keep an account with the Mastin Bank at the time of this transaction, and the alleged usage was not shown to exist, except in Kansas City.

Whatever the custom of banks and dealers in that city may

be in matters of this kind, it could not confer the authority here claimed for it.

The Exchange Bank was not in any way bound to recognize the deposit made by defendants in the Mastin Bank for its use, or to take any action in respect to it.

For the purpose of transmitting the money the defendants could have notified the Exchange Bank that they held it subject to order, and the act would have been just as effective.

That the money was not sent, or anything that could symbolize it, is too plain for argument.

The language of the deposit slip is, "Your account has credit," which means no more than we hold for your use, or we have a sum of money, and you can get it whenever you may apply for it. Until the Denver Bank should agree to such holding in some form, or should send for the money by draft or otherwise, no transfer of the fund would take place.

And whether this would have been done by the Denver Bank at any time, if the Mastin Bank had continued in business, is a matter for conjecture only. They were not bound to act, and we cannot assume that they would have taken any step to get the money.

That is not, however, of any importance in this connection. It is only necessary to say that defendants were instructed to send the money to the Exchange Bank, and they have not done it.

That they acted in good faith upon the assumption that the Exchange Bank would accept the credit in the Mastin Bank, and that the course pursued by them was sanctioned by commercial usage at Kansas City, will not help them.

They should have put the money into the Exchange Bank, or adopted the usual and ordinary means to effect that end, and having failed to do either, and to show affirmatively that such failure was not the cause of the loss, they must be held for the amount.

The judgment will be for the plaintiff.

EGBERT and others *v.* CITIZENS' INSURANCE COMPANY OF MISSOURI.

(Eastern District of Missouri. March, 1881.)

1. DEPOSITION — CAPTION — NAMING PARTIES.— Where depositions are taken *de bene esse*, under the act of congress of May 9, 1872, in a case in which there are several parties plaintiff and defendant, it is not necessary to state in the caption the names of all the parties to the suit. It is sufficient to give the style in the case thus: *A. B. et al., plaintiffs*, v. *C. D. et al., defendants.*
2. SAME — SAME.— A caption sufficiently shows the reason for taking depositions if it states where the depositions are taken, without giving the distance from the place of taking to the place of trial, if the distance is in fact, and is well known by all parties to be, more than one hundred miles.
3. SAME — CERTIFICATE.— Where an officer by whom depositions are taken seals them up, marks the style of the case on the envelope, directs them to the clerk of the court in which the case is pending, and writes the usual indorsement across the seal, and the depositions are received by the clerk to whom they are addressed, through the mail, *held*, that the certificate to the depositions should be deemed sufficient, though it fails to state that the officer delivered the depositions to the court in which the cause was pending, or that he sealed them up and deposited them in the postoffice.

Motion to suppress depositions.

E. T. Farish, for plaintiff.

O. B. Sansum, for defendant.

TREAT, *District Judge.*— The several plaintiffs named in this suit, according to the petition, were copartners doing business in San Francisco, California. The defendant, being a Missouri corporation, had an established agency in the former place, and its agents there drew a bill of exchange on the defendant dated July 12, 1877, for $2,500, on account of a loss sustained under a named policy. Said bill went to protest. Subsequently, in 1877, successive payments were made thereon to the amount of $1,700, and this suit was instituted September, 1879, in the state court, for the balance due. The defendant filed a general denial, and caused the suit to be removed to

this court, January, 1880. In the course of subsequent proceedings, the plaintiffs, by their attorney, gave the following notice to take depositions:

R. S. EGBERT *et al. v.* THE CITIZENS' INS. CO. OF MISSOURI.

(In the United States Circuit Court, Eastern District of Missouri.)

To the above named defendant or O. B. Sansum, attorney of record:

You are hereby notified that the depositions of George W. Scott, C. D. Farnsworth, J. P. Clark and E. Potter, witnesses, to be read in the above entitled cause, on the part of plaintiff, will be taken at the office of Samuel F. Murphy, notary public and commissioner, No. 607 Montgomery street, in the city of San Francisco, state of California, on the fourteenth day of February, 1881, between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon of that day; and that the taking of said depositions, if not completed on that day, will be continued from day to day, at the same place and between the same hours, until completed.

EDW. F. FARISH, Attorney for Plaintiffs.

Service of the above notice is hereby acknowledged. St. Louis, January 26, 1881.

O. B. SANSUM, Attorney for Defendants.

Under this notice depositions were taken and returned to this court. A motion has been filed to suppress those depositions on several grounds, and numerous authorities cited in support of the motion, most of which pertain to *ex parte* depositions under the act of 1789, and are deemed inapplicable to depositions taken under notice pursuant to the act of 1872. When an *ex parte* course was pursued under the former act, the courts insisted upon a rigid compliance with all its requirements, inasmuch as such proceedings were in derogation of the common law, and might be had without notice to the adverse party, or his attorney, under circumstances indicated therein. If a party chose to pursue that course, the supreme court of the United States, in 1851 (*Walsh* v. *Rogers*, 13 How.

283), said: "Testimony thus obtained must always be unsatisfactory and liable to suspicion, especially if the party has had time and opportunity to take it in the regular way." That court gave the reason which induced the act of 1789 in that respect, restated the rule that depositions without notice were in derogation of the common law, etc. There was a hint, at least, looking to the distinction between depositions when taken with, and when taken without, notice. The act of 1872 has, to a large extent, cured the evil thus complained of.

These general remarks are here made, because it is not proposed to review in detail the many authorities cited, or to enter upon a discussion of each of the several grounds of the pending motion. It must suffice to pass upon each *seriatim*. It is objected to as follows:

(1) Because the caption of the depositions fails to state the names of all the parties to the suit; that is, instead of naming each of the copartners plaintiffs, it followed the style of the case as given in the notice and as docketed.

The strict rule laid down by the United States supreme court with respect to transcripts of records to that court on error or appeal, upon which judgment or decrees may follow, it seems to us ought not to be pushed to the extreme contended for with respect to depositions where all the parties had notice and knew in what case the testimony was sought.

(2) Because the caption of said depositions failed to show any cause for taking said depositions; that is, it does not state that San Francisco, in California, is more than one hundred miles distant from St. Louis.

It will be observed from the statement of the case that it originated in San Francisco, through the agents of the defendant, and the notice was to take the depositions there, and the respective parties knew as well as this court, judicially, that those cities are more than one hundred miles distant. Why, then, should the notary be required to state what was apparent and known to all concerned? The act of congress gives the distance as good cause for taking such depositions.

(3) Because the officer before whom said depositions were taken fails to certify that he delivered them to the court in which said cause is pending, or that he sealed them up and deposited them in the postoffice in San Francisco.

This objection is fully met by the fact that the envelope came through the mail from San Francisco, addressed to the clerk of this court, was received by the latter accordingly, was marked with the style of the case, and had the usual indorsement across the seal. It cannot be supposed that before sealing the envelope the officer was bound to certify in the enclosed certificate that he *had* done what could not be done until after the sealing.

The other objections are too vague and indefinite to require notice. It is not to be understood that this court will relax any rule which is proper or essential to enable it to ascertain definitely that depositions are taken within the requirements of the acts of congress, and with due regard to the interest of contesting parties.

There are in civil cases, as stated in the act of 1789, and as continued in all subsequent legislation, two grounds for taking depositions:

(1) That the witness lives at a greater distance than one hundred miles from the place of trial; (2) that, if living within one hundred miles, he is bound on a voyage to sea, or is about to go out of the United States, etc.

If it definitely appears that the witness resides more than one hundred miles distant, the ground for taking the same is within the terms of the statutes; and in order to read the same nothing further is required, provided the same was properly taken and certified. Under the second head, it may be that if objection is made the court would refuse to hear the deposition if it appeared that the witness was still within one hundred miles. The several provisions of the United States laws on this subject are embodied in section 863 *et seq.;* and by an examination of the various prior acts of congress indicating the course of legislation on the subject, and the many

decisions made from time to time under the then existing statutes, it will be seen that under section 863 reasonable notice must now be given in writing by the party or his attorney to the opposite party or his attorney, as either may be nearest, which notice shall state, etc. Pursuant to this section the depositions in this case were taken, and, it is held, taken in due conformity with the statutes, as sufficiently appears from the record, notice and certificate.

A party may apply for a *dedimus* and cause testimony to be taken, if the *dedimus* so states, *orally;* full notice being given to the opposite party, or his attorney, to appear and cross examine, or to take the testimony by interrogatories and cross interrogatories, filed and settled by the court.

The motion to suppress is overruled.

COTTRELL *v.* PIERSON, Sheriff, and others.

(District of Nebraska. May, 1881.)

1. JUDGMENT — LIEN — BANKRUPTCY.— The plaintiff in a judgment in a state court which constitutes a lien on the land of the defendant is not deprived of his lien by a failure to prove his judgment in bankruptcy, in case the defendant is adjudged bankrupt after the rendition of the judgment.
2. JUDGMENT IN FAVOR OF THE UNITED STATES — PRIORITY.— The priority given to the United States under certain sections of the Revised Statutes of the United States does not overrule any liens upon the debtor's property which existed before the event occurred which gives the statutory priority; that is, before the insolvency of the debtor.

Bill in equity.

This cause had been, by consent of parties, submitted for the consideration of the court upon exceptions to the answer of respondents.

The question presented is as to which of two judgments against one James Cameron shall operate as a prior lien upon his real estate. After the judgments were rendered and be-

came liens upon his real estate, Cameron was adjudged a bankrupt. The older judgment was not proved against the estate of the bankrupt, while the junior judgment was so proved. The junior judgment was in favor of the United States; for which reason priority is claimed for it. The exact facts as they appear by the answer are as follows:

1st. March 18, 1875, the Springfield Manufacturing Company obtained a judgment in the district court of Richardson county, Nebraska, against C. Hershey, J. M. Minnick and James Cameron.

2d. October 14, 1875, the United States recovered a judgment in the United States district court for the district of Nebraska against Maggie Vandeventer, administratrix of the estate of George Vandeventer, deceased, James Cameron, D. V. Stephenson and Thomas C. Cunningham.

3d. March 8, 1877, James Cameron filed his petition in bankruptcy, and in February, 1878, received his discharge.

4th. March 15, 1878, an execution was issued on the judgment last aforesaid in favor of the United States, and was levied upon the lot in controversy as the property of James Cameron, and the same was sold thereon to Cottrell, the plaintiff in this action. The said sale having been confirmed, on the twenty-fourth day of May, 1878, the United States marshal executed and delivered to Cottrell a deed for the premises.

5th. January 7, 1879, the Springfield Manufacturing Company caused an execution on its judgment above mentioned to issue out of the district court of said county of Richardson, directed to the sheriff (Pierson), the defendant in this action, and the said sheriff has levied the same upon the lot in controversy.

6th. In the case at bar the plaintiff (Cottrell) has obtained an order of injunction restraining the sheriff from selling the property under said execution, and he prays that said injunction be made perpetual.

Towle & Reavis, for complainant.

Schoenheit & Thomas and *S. A. Fulton*, for respondents.

McCRARY, *Circuit Judge.*—By the law of Nebraska a judgment rendered by the district court of that state is a lien upon the real estate of the defendant in such judgment, situated within the county where rendered. Assuming that a judgment of the United States district court is a lien in like manner and to the same extent as if rendered by a state court of general jurisdiction, it follows that the judgment of the Springfield Manufacturing Company, being earliest in date, is the first lien unless it has been divested or displaced by the proceedings in bankruptcy against Cameron, the judgment debtor, or is held subordinate to the latter judgment upon the ground that the latter is a judgment in favor of the United States and entitled to priority on that account.

It will be observed that the judgment of the Springfield Manufacturing Company was obtained over two years before the commencement of the proceedings in bankruptcy, and that there is no charge of fraud or collusion in obtaining the rendition thereof. Did the failure of the plaintiff in said judgment to prove its claim in the bankruptcy court deprive it of its lien? I think not. There is high authority for the proposition that the lien of a creditor on the real estate of a bankrupt is not lost by his failure to prove his debt. *Assignee of Wicks & Co.* v. *Perkins*, 1 Woods, 383; 13 B. R. 280. The creditor in such a case may rely upon his security and omit to prove his claim in bankruptcy, and by so doing he will lose only his claim against the general estate of the bankrupt. The law did not require the lien holder to prove his debt in order to save his lien. Having a judgment in the state court by which his lien was established, he had no occasion to apply to the bankruptcy court for aid in its enforcement. Whether the judgment creditor in this case could have caused execution to issue and had his judgment enforced by sale pending the bankruptcy proceedings may admit of some question, since the estate was in a certain sense in *custodia legis*. In the case above cited, Judge Woods expressed the opinion that the lien could have been enforced either before or after the end of the proceedings in bankruptcy. However this may be, I

am clearly of the opinion that after the proceedings in bankruptcy had terminated, there was nothing in the way of the enforcement of the lien of the judgment in the state court by execution and sale. Freeman on Judgments, 28, 29; *Second National Bank* v. *National Bank*, 14 Am. Law Reg. 281.

The question remains whether the judgment in favor of the United States, under which complainant purchased, was a lien prior and paramount to that created by the earlier judgment in favor of the Springfield Manufacturing Company. The affirmative of this proposition must be maintained, if at all, under the provisions of secs. 346 and 5101 of the Revised Statutes of the United States.

The first of these provides that "whenever any person indebted to the United States is insolvent * * * the debts due the United States shall be first satisfied," and this priority is declared to extend to cases in which an act of bankruptcy is committed. Section 5101 provides that in the order for a dividend in a bankruptcy proceeding after paying certain costs and expenses, "debts due the United States shall have priority."

It may now be regarded as settled that the priority of the United States, given by these statutes, "does not overrule any liens upon the debtor's property which existed before the event occurred which gives the statutory priority, that is, before the insolvency." *United States* v. *Lewis*, 13 N. B. R. 38; *Conrad* v. *Ins. Co.* 1 Pet. 438; *Brent* v. *The Bank*, 10 Pet. 596.

In so far as the early case of *Thelluson* v. *Smith*, 2 Wheat. 396, may have asserted a different doctrine, it is overruled by the later decisions of the supreme court of the United States above cited. As the lien of the judgments in favor of the Springfield Manufacturing Company existed more than two years before the insolvency of Cameron, it follows by the rule above laid down, that it is not displaced by the subsequent judgment in favor of the United States.

The exceptions to the answer are overruled, and its averments being admitted, there must be decree for respondents.

Bowman *v.* Wilson, Assignee.

(Western District of Missouri.)

1. Interest — When Allowed — Fund in Court.— Interest is allowed upon the ground that the debtor is in default and has the use of claimant's money. It is not, as a rule, allowed where payment has been prevented or suspended by the order of a court of competent jurisdiction to await settlement of controversy among several claimants.

Bill of review.

The complainant is a judgment creditor of William James, bankrupt, of whose estate respondent is the assignee.

Prior to the bankruptcy complainant had caused execution to issue upon his judgment, and the same had been levied upon certain real estate of the bankrupt. By an order of the district court complainant, with other judgment creditors, was enjoined from proceeding any further under said judgment, and required to bring his judgment for settlement and payment before said district court. The said judgment was a lien upon the real estate of the bankrupt, and as such a preferred claim, and was duly allowed on the eighteenth of June, 1878. Afterwards, by an order of said district court, made on the fourteenth of February, 1879, the assignee was directed to sell the real estate of said bankrupt, freed and discharged from all lien and incumbrance. Under said order the real estate was sold July 7, 1879, for $20,000, out of which sum complainant's debt was payable. September 11, 1879, there was paid on said claim $418.

A controversy arose as to the fund out of which the taxes upon the real estate should be paid. This controversy having been decided by the district court, the assignee filed his bill of review in this court, and upon final hearing the order of the district court was affirmed on February 10, 1881. These proceedings delayed the distribution of the fund until March 26, 1881, when the district court made an order of distribution allowing complainant *interest on his claim only to July 7, 1879, the date of the sale of the real estate, and the payment*

of the fund into court. Complainant claims that he is entitled to interest to the final payment, and files this bill to review and correct the alleged error of the district court in this respect.

L. F. Parker, for complainant.

B. B. Kingsbury, for respondent.

McCrary, *Circuit Judge.*— Interest is allowed upon the ground that the debtor is in default and has the use of claimant's money. It is never allowed where by the order of a court of competent jurisdiction, or by the interposition of the law, or the act of the creditor, payment of the debt has been prevented. During the continuance of such prevention the interest does not run. If a fund is in the custody of the law — in the possession of a court — and cannot be paid out without the order of such court, it does not ordinarily bear interest. I know of no principle of law or equity upon which the interest claimed can be allowed at the expense of the general unsecured creditors, who are certainly in no wise responsible for the delay in making the final order of distribution. 1 Am. Lead. Cases. (3d ed.) 516 *et seq.*

Demurrer to bill sustained.

Decree for respondent.

Kellogg *v.* Miller.

(District of Nebraska. January, 1881.)

1. Construction of Contract — Usury.— The law will not so construe a contract as to make it void if it will reasonably bear a different construction making it valid; and the defense of usuary, especially where the penalty is the forfeiture of the whole debt, must be established by a clear preponderance of testimony.
2. Same — Same — Contract Made with Reference to Law of a Particular State.— A contract fairly and honestly made between a citizen of Nebraska and a citizen of New York, whereby the latter agrees

to loan to the former a sum of money at a rate of interest lawful in Nebraska, to be secured by mortgage on lands in Nebraska, is a valid contract, even if actually executed in New York, where the rate of interest named is unlawful.

3. SAME — SAME — PLACE OF PERFORMANCE.— The general rule is that the law of the place where the contract is made is to govern in expounding and enforcing it; but an exception to this rule arises where a citizen of one state loans money to a citizen of another state, and the parties in good faith contract for the rate of interest allowed by the law of the latter; and especially where the money is to be used in the latter and is secured by a mortgage upon lands located there.

In equity.

On exceptions to master's report. Suit to foreclose mortgage. Defense, usury.

The material facts, as well as the master's conclusions of law, appear in his report as follows:

"*First.* That in the year 1871, and long prior thereto, the complainant, Smith Kellogg, resided in the state of New York, and the defendants, Jason G. Miller and his wife, Mary P. Miller, resided in Saunders county, in the state of Nebraska, and were each *bona fide* residents of the places named.

"*Second.* That in the month of January, A. D. 1871, the defendant, Jason G. Miller, went in person to the state of New York for the purpose of selling a portion of his lands situate in Nebraska, or obtaining thereon a loan of money.

"*Third.* That on or about January 30, 1871, the defendant, Jason G. Miller, negotiated with complainant at Le Roy, in the state of New York, for a loan of $15,000 at ten per cent. interest per annum, to be secured by a mortgage upon defendants' lands in the state of Nebraska, Miller agreeing that he would return to Nebraska and there make and execute the bond and mortgage, transmit the same to complainant for inspection, and then record said mortgage in the clerk's office of the proper county.

"*Fourth.* That Miller represented to Kellogg that ten per cent. was the legal rate of interest in Nebraska; and I find as a matter of fact that said contract was honestly made and en-

tered into by said parties, having reference to the laws of Nebraska, where the real estate security was situated.

"*Fifth.* I find that as an advance upon said loan the complainant, Kellogg, upon the thirtieth of January, A. D. 1871, paid to Miller at Le Roy, New York, the sum of one thousand dollars, and gave to Miller his note, payable at bank March 15, 1871, for $3,500, interest being taken on both said sums at ten per cent. per annum.

"*Sixth.* I find that defendant, Miller, returned to Nebraska, and on the sixth day of March, 1871, sent to his brother, R. H. Miller, at Le Roy, New York, the bond and mortgage and abstract of title, notifying the complainant thereof, for inspection.

"*Seventh.* That said bond and mortgage were executed by Jason G. Miller and Mary P., his wife, in the state of Nebraska, about March 1, 1871.

"*Eighth.* That on the fifteenth day of March, 1871, the complainant, Smith Kellogg, paid to R. H. Miller, for the use of the defendant, Jason G. Miller, on said loan, the sum of $7,500, and left in his hands as collateral security said bond and mortgage to secure the payment of the balance of the $15,000 within the time agreed upon.

"*Ninth.* That upon the sixth of May, 1871, thereafter, the whole amount of $15,000 having been paid, the said bond and mortgage were, at Le Roy, New York, delivered by said R. H. Miller to complainant.

"*Tenth.* I find that said bond was payable in Nebraska, and by its express terms was payable in sight drafts upon New York city.

"*Eleventh.* I find as conclusions of law, that said contract made in New York, but payable in Nebraska, both parties contracting with reference to the laws of Nebraska, and the rate of interest taken, reserved and contracted for not exceeding the legal rate then lawful in the state of Nebraska, the loan was not tainted with usury."

J. H. Martindale and *W. J. Lamb*, for complainant.

T. M. Marquett, for respondent.

McCrary, *Circuit Judge.* — By the law of New York a contract for the payment of more than seven per cent. per annum interest on money borrowed is absolutely void. If, therefore, the contract sued on in this case is a New York contract and to be governed by the New York statute, it cannot be enforced. If, on the other hand, it is a Nebraska contract and to be governed by the Nebraska statute, it is valid. To aid us in the determination of the question, what law shall be applied, we have the following undisputed facts:

1. That complainant is, and was at the time of the contract, a resident and citizen of the state of New York, and that dedefendant is, and was at said time, a resident and citizen of Nebraska.

2. That the terms of the loan were agreed upon in New York, and it was there agreed that it should be secured by mortgage upon lands in Nebraska and by bond, both to be executed in Nebraska.

3. That afterwards the bond and mortgage were executed by respondents, J. G. Miller and wife, in Nebraska, and sent by mail to R. H. Miller, in Le Roy, New York, by whom they were at that place delivered to complainant.

4. The money was actually paid to respondent, Jason G. Miller, through his agent in New York.

5. The bond stated on its face no place of payment.

6. The loan was made with the understanding that the bond and mortgage would be executed in Nebraska, and that the interest should be according to the law of Nebraska.

It is to be observed, in the first place, that the law will not so construe a contract as to make it void if it will reasonably bear a different construction making it valid; and the defense of usury, especially where the penalty is the forfeiture of the whole debt, must be established by a clear preponderance of testimony. 1 Jones on Mortgages, sec. 643, and cases cited.

It is not to be doubted that a contract fairly and honestly made between a citizen of Nebraska and a citizen of New York, whereby the latter agrees to loan to the former a sum of money at a rate of interest lawful in Nebraska, to be secured by mortgage upon lands in Nebraska, and to be performed in and governed by the law of that state, is a valid contract, even if actually executed in New York.

"Where the contract is made in one place and is to be performed in another place, * * * the law of this last place must determine the force and effect of the contract, for the obvious and strong reason that parties who agreed that a certain thing should be done in a certain place intended that a legal thing should be done there, and therefore bargained with reference to the laws of the place, not in which they stood, but in which they were to act." Parsons' Mercantile Law, p. 321.

This rule applies here, if we may assume that the contract was to be performed in Nebraska; and that it was to be performed there seems to be clear in view of the following facts:

1. No place of performance is named.
2. The obligor resided there.
3. The land mortgaged is situated there; and
4. The bond and mortgage were executed there.

Says the same author: "If the contract be made by letter or by separate signatures to an instrument, the contract is then made where that signature is put to it, or that letter is written, which in fact completes the contract."

Although certain preliminary negotiations were had in New York, yet the contract was consummated, so far as Miller was concerned, when he executed the bond and executed, acknowledged and recorded the mortgage in Nebraska, and deposited them in the postoffice directed to his brother in New York, to be by him delivered to complainant. That is the place where the signature was put to these papers which in fact completed the contract. It is said that the delivery was in New York, and that the contract was not consummated until the papers were delivered. But the proof shows that the parties

agreed that the bond and mortgage should be executed in Nebraska; that the mortgage should be recorded there, and that after recording the papers should be sent to New York to the complainant. Under these circumstances, I think that a delivery of the mortgage to the recorder for record was a sufficient delivery to the grantee. *Cooper* v. *Jackson*, 4 Wis. 537; *Marterman* v. *Chich*, 23 Ill. 72; *Hedge* v. *Drew*, 12 Pick. 141; *Jackson* v. *Cleveland*, 15 Mich. 94; *Boody* v. *Davis*, 20 N. H. 140.

But it is not necessary to place the decision of the case upon the ground that the contract was to be performed in Nebraska.

It is now well settled by authority, as it is certainly well supported by reason, that a citizen of one state may loan money to a citizen of another state, and contract for the rate of interest allowed by the law of the latter, especially in a case like the present, where the money is to be used in the latter state, and is secured by a mortgage upon lands located there; and this notwithstanding the place of payment may be elsewhere. This doctrine constitutes an exception to the general rule that the law of the place where the contract is made is to govern in enforcing and expounding it. Thus in the case of *Arnold* v. *Potter*, 22 Iowa, 194, it was held that it is competent for citizens of different states, who are parties to a promissory note, to contract in good faith for the rate of interest, and with reference to the law of the state where the maker resides and where the property mortgaged to secure the note is situated, although the note is in terms payable in a state different from the residence of either, and the rate of interest reserved is greater than the legal rate of the state where the note is made or where by its terms it is payable.

In that case Wright, J., said: "The general rule is well settled that the law of a place where a contract is made is to govern in enforcing or expounding it, unless the parties provide for its execution elsewhere; in which case it is to be governed by the law of the latter place. The parties may,

however, if it is made in one place to be executed in another, stipulate that it shall be governed by one or the other." And again: "Nor do we hold that a citizen of one state could make his note in another to a resident there, payable in a third, with interest as allowed in a fourth. But what we do hold is, that if A of Iowa, in good faith, borrows money of B of Illinois, gives security on land in Iowa, and they in good faith agree that the law of Iowa shall govern, that a note given in pursuance of said contract in Illinois, bearing the interest allowed by our laws, would not be usurious." And the same rule is laid down by Chancellor Kent, who says: "The general doctrine is, that the law of the place where the contract is made is to determine the rate of interest where the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on land in another state, *unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest.*" 2 Kent Com. (12th ed.) 460. And see *Newman* v. *Kershaw*, 10 Wis. 333; *Vliet* v. *Camp*, 13 Wis. 221.

Lord Mansfield laid down the rule in these words: "The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." *Robinson* v. *Bland*, 2 Barr, 1077, 1078.

In applying this rule in this case there is but a single question of fact to be considered, and that is the question of good faith. Did the parties in good faith agree that this loan should be made according to, and to be governed by, the law of Nebraska? As already said, the law will presume an honest intent, unless there is something in the nature of the transaction or in the proof to establish the contrary. The usury law of New York is a statute highly penal in character, and a purpose to violate it will not be presumed in the absence of clear proof. So far from showing clearly a purpose on the part of complainant to violate that statute, I think the contrary appears. That the parties both understood that they were contracting

with reference to the law of Nebraska is affirmatively shown by the testimony. In the course of the negotiations reference was continually had to the law of Nebraska relating to interest. The borrower lived there and represented to complainant that a loan at ten per cent. under the laws of Nebraska would be lawful. Advice was taken as to the proper mode of contracting under that law, and out of abundance of caution it was decided that Miller should return to Nebraska and there execute the bond and mortgage and have the latter recorded, after which he was to forward them by mail to complainant in New York. Respondent, J. G. Miller, himself admits in testimony that he informed complainant that the legal rate of interest in Nebraska was ten per cent., and that complainant informed him that he wanted to make the contract so as to be sure of that rate of interest. When we bear in mind that the parties had, under the circumstances in which they were placed, a perfect right to adopt the law of either state, provided only they did so in good faith, and that they were so advised, it is difficult to see what sufficient motive they could have had to resort to any device or to act in bad faith. Men do not ordinarily prefer to violate a penal statute and run the risk of the confiscation of valuable property, when a safe, convenient and honest way of proceeding is open before them.

It only remains to consider some facts not enumerated above, and upon which counsel for respondents relies. It appears that at the time of the original agreement the complainant advanced to Miller $4,500, on which interest at ten per cent. was charged from January 30, 1871, to March 15, 1871. It is insisted that as to this sum there was usury under the law of New York, and that inasmuch as the $4,500 went into the mortgage debt and into the bond, it makes the whole bond usurious. But it is clear that there was in reality but one transaction, to wit: A loan of $15,000 to a citizen of Nebraska to be secured upon land in that state, and to bear ten per cent. per annum interest according to the law of that state.

This being so, the fact that pending the preparation and ex-

ecution of the necessary papers, and their transmission from Nebraska to New York, the complainant advanced a portion of the loan at the rate of interest agreed upon, was not a violation of the usury laws of New York.

I hold that, according to the evidence and the law, the entire transaction from the beginning was conducted with reference to the law of Nebraska relating to interest, and must be judged by that law alone. This renders it quite unnecessary to go into the question whether ten per cent. interest was actually paid in New York upon the sum advanced on the loan, or any part of it; because if it is so, it does not render the contract usurious.

The exceptions to the master's report are overruled, and decree will be entered for complainant in accordance with the said report.

Ex parte Peters.

(Western District of Missouri. April, 1880.)

1. Indictment for Several Offenses in One Indictment.— Sec. 1024 of the Revised Statutes of the United States permits separate offenses of the same class, and growing out of the same transactions, to be joined in one indictment in separate counts, provided they be such as may be properly joined.
2. Same — Burglary — Larceny.— Burglary and larceny growing out of the same transaction are such distinct offenses as to be properly joined in the same indictment in separate counts and separately punished.
3. Same — Same — Same.— *Held*, accordingly, that a person who breaks and enters a house with intent to steal therefrom, and actually steals, may be punished under separate indictments, or under separate counts in the same indictment, for two offenses, or one, at the election of the power prosecuting him; and a person charged and convicted of both offenses growing out of the same transaction is not entitled to be released from imprisonment on *habeas corpus*, upon the ground that his sentence was illegal and void, either in whole or in part.

Petition for discharge under the *habeas corpus* act.

McCRARY, *Circuit Judge.*— Petitioner was indicted in the United States district court for this district. The indictment contained four counts.

The first count charged the petitioner with burglary in breaking and entering the building used as a postoffice at Bucklin, Linn county, Missouri, with intent to commit a larceny, on the twenty-eighth of October, 1874.

The second count charged him with larceny committed at the same time and place by stealing from said postoffice a letter containing $307.50.

The third count charged him with burglary in breaking and entering the building used as a postoffice at Unionville, Putnam county, Missouri, with intent to commit larceny, on the twelfth day of November, 1874.

The fourth count charged him with larceny at the same time and place named in the third, by stealing from said postoffice two letters, one containing the sum of $146.30 in money.

There was a plea of guilty upon all the counts, and the petitioner was sentenced to be imprisoned in the penitentiary of Missouri for the term of two years under each of the four counts; the first term to commence on the eighth of March, 1875, the second to commence on the expiration of the first term of two years, the third term to commence on the expiration of the second term of two years, and the fourth term to commence on the expiration of the third term of two years, and said four terms to constitute a continuous imprisonment of eight years.

On the eighteenth of April, 1877, petitioner applied to this court for release on the ground that his imprisonment was illegal, and upon full consideration it was then determined that his sentence was valid at least for two terms of two years each, the court being of the opinion that at least two distinct offenses were charged, one in the first and one in the third count, and that after conviction, by force of section 1024, R. S., these two offenses must be treated *in this proceeding* as having been "properly joined."

The question as to the validity of the remainder of the sentence was expressly reserved until it should be presented after the expiration of four years of imprisonment. See 4 Dillon, p. 169.

The two terms of two years each having expired, the petitioner now renews his application for discharge, and we are called upon to determine whether the sentence as to the remaining four years is valid.

The ground of the petitioner's application for discharge is thus stated in his petition now before us:

"And your petitioner alleges that his present imprisonment is illegal, and that he is entitled to be discharged therefrom, in this, that he has fully served out the terms of imprisonment imposed upon him for the two burglaries charged in the indictment, and that the other two sentences of two years each were imposed for two separate larcenies, each of which is charged in said indictment to have been committed at the same time and place, and as part and parcel of a burglary whereof this petitioner was duly convicted and sentenced, and your petitioner avers the said sentences to be illegal in this, that the district court had no legal power to sentence this petitioner to imprisonment for a larceny charged to have been committed at the same time and place, and as part of the same act of burglary whereof he was convicted and sentenced."

I. There is no statute of the United States affecting this question, and we are therefore to adopt and follow the rule of the common law. Conkling's Treat. (5th ed.) 181.

II. The question tersely stated is, whether it was competent for the district court to sentence the petitioner for both burglary and larceny charged in separate counts, but both appearing to be part of the same act.

Sec. 1024 of the Revised Statutes is as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined

in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them consolidated."

The effect of this statute is to permit separate offenses of the same class and growing out of the same transactions to be joined in one indictment in separate counts, provided they be such as may "be properly joined." It makes no change in the law as it previously existed, except to permit offenses which might have been theretofore presented in separate indictments to be presented in separate counts of the same indictment. It leaves entirely open the question whether burglary and larceny, growing out of the same transaction, are such distinct offenses as to be properly joined in the same indictment and separately punished.

According to the great weight of authority, it may be regarded as settled that a person who breaks and enters a house with intent to steal therefrom, and actually steals, may be punished under separate indictments for two offenses, or one, at the election of the power prosecuting him. 1 Bishop on Crim. Law, sec. 1062, and cases cited.

The case of *Josslyn* v. *Commonwealth*, 6 Metcalf (Mass.), 236, is directly in point. See also *State* v. *Ridley and Johnson*, 48 Iowa, 370, and *Breese* v. *State*, 12 Ohio St. 146.

The opposite view was ably stated by Waite, C. J., in his dissenting opinion in *Wilson* v. *State*, 24 Conn. 57, and his reasoning is so strong that if it were a question of first impression, I should be inclined to adopt his opinion. Looking, however, to the adjudicated cases, I find the law to be very well settled against the position assumed by the counsel for petitioner. I am the more inclined to follow these adjudications in this case because the punishment inflicted might, under the two counts admittedly good, have extended to ten years' imprisonment. R. S. secs. 5469, 5478.

The prayer of the petitioner is denied.

KREKEL, *District Judge*, concurs.

TABORECK *v.* THE B. & M. R. R. CO. IN NEBRASKA.

(District of Nebraska. January, 1881.)

1. LAND GRANT — ACT OF CONGRESS OF JULY 2, 1864.— Under the act of congress of July 2, 1864, making a grant of lands to the Burlington & Missouri River Railroad Company in Nebraska (13 Stat. p. 364), the grant to the company attached to the land in controversy in this case on the fifteenth day of June, 1865, the date at which the line of the railroad was definitely fixed, although the land may have been actually selected by the company and patented to it at a later date.
2. SAME — LATERAL LIMITS OF GRANT.—The fact that the grant to the defendant company has no lateral limits does not affect the question as to the date at which the rights of the company became vested.
3. ACT OF CONGRESS OF APRIL 21, 1876 — HOMESTEAD AND PRE-EMPTION RIGHTS.— The act of congress of April 21, 1876 (19 Stat. 35), which confirms all pre-emption and homestead entries in compliance with law, made in good faith by actual settlers, upon tracts of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office in the district in which such lands are situate: *Held* applicable only to cases where notice of withdrawal of the lands was required by law to be given.

Suit in equity.

The facts in this case have been agreed upon, and are as follows:

1. George C. Cummings, on the twentieth day of December, 1865, obtained a homestead entry upon the south half of the northeast quarter of section twenty-five, town seven (7), range three east, in Saline county, Nebraska, from the land department of the government.

2. And on or about April 21, 1871, complainant duly gave the required notice, and the land department of the government canceled the homestead entry of George C. Cummings, for abandonment.

3. On the twenty-first day of April, 1871, Joseph Taboreck, complainant, being duly qualified, obtained a pre-emption filing, No. 7780, on the tract of land in bill described, and made residence and settlement same day.

4. On the fifteenth day of March, 1872, Joseph Taboreck

having lived upon said land in bill described from the twenty-first day of April, 1871, converted his pre-emption filing, No. 7780, into a homestead entry; he, being duly qualified, did obtain a homestead entry on said tract of land under and by virtue of the homestead laws of the United States.

5. And Joseph Taboreck has lived upon said land in bill described since the fifteenth day of March, 1872, and cultivated the same, built a good frame house on said land, has sixty acres under cultivation, forest, vineyard, orchard, outhouses, etc.; and made it his domicile on said land, and has duly fulfilled the requirements of the homestead law in respect to domicile and improvements; and the tract of land is worth over five hundred dollars, exclusive of costs.

6. On or about the first day of July, 1876, complainant duly made the proofs required by the homestead law of the United States to entitle him to a patent, and the land department of the United States refused complainant a patent for the reasons it had been approved to the Burlington & Missouri River Railroad Company, June 28, 1875, under and by virtue of an act of congress approved July 2, 1864.

7. And it was not until the eighth day of April, 1875, that the tract of land in bill described was selected by the Burlington & Missouri River Railroad Company, respondents, under the supervision of the secretary of the interior of the United States, for said railroad company; and said land was afterwards approved and patented to the Burlington & Missouri River Railroad Company under and by virtue of an act of congress approved July 2, 1864, making a grant of land to said railroad company.

7a. If the court finds for the respondent, it is agreed that the fact of the value of the improvements may be referred to D. G. Hull, master in chancery, to find the fact of the value of the improvements.

7b. It is further stipulated that the Burlington & Missouri River Railroad Company, a corporation of Iowa, duly assigned and transferred, by virtue of an act of congress authorizing it

to make said transfer, all its privileges, immunities and rights it had by virtue of an act of congress, approved July 2, 1864, to said land grant, to the Burlington & Missouri River Railroad Company in Nebraska, the respondent or defendant.

8. The Burlington & Missouri River Railroad Company, under and by virtue of an act of congress approved July 2, 1864, making a grant of land to said railroad company, and in compliance with said granting act, accepted said grant under and by virtue of said act of congress, and definitely fixed the line of road on the fifteenth day of June, 1865, and built the railroad thereon as contemplated by said act of congress, and the tract of land in question is located within twenty mile limits of the line of said road as thus definitely fixed and located, and was patented to said company, this defendant, in pursuance of said act.

H. H. Blodgett, for complainant.

T. M. Marquett and *J. W. Deweese*, for respondents.

McCrary, *Circuit Judge.*— The controlling question in this case is, did the grant to the Burlington & Missouri River Railroad Company attach to the land in controversy on the fifteenth day of June, 1865, the date at which the line of the railroad was definitely fixed under the provisions of the act of congress approved July 2, 1864, making a grant of land to said company? 13 Stat. p. 364, sec. 19.

Complainant insists that the title did not pass to the company until the land was actually selected by the company and patented to it.

Section 19 of the act above named provides as follows: "Section 19. *And be it further enacted*, that for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington & Missouri River Railroad Company every alternate section of public land (excepting mineral lands as provided in the act) designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved

or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time that the line of said road is definitely fixed: *provided*, that said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the secretary of the interior, and shall also establish the line of said road, and file a map thereof with the secretary of the interior, within one year of the date of said acceptance, when the said secretary shall withdraw the lands embraced in this grant from market."

The agreed statement of facts shows that the line was definitely fixed June 15, 1865, at which time the land in question had not been sold, reserved or otherwise disposed of by the government, nor had any pre-emption or homestead claim attached. The complainant's claim, whatever it was, did not attach to the land until in the year 1871, at which time the proceedings to obtain title under the homestead law were inaugurated.

The general rule that grants of land of this character take effect from the time that the line of the railroad is definitely fixed or located, is well settled. *Knevals* v. *Hyde*, 1 McCrary, 402; *Railroad Co.* v. *Smith*, 9 Wall. 95; *The United States* v. *The B. & M. Co.* 98 U. S. 334; *M. K. & T. Railway Co.* v. *K. P. Railway Co.* 97 U. S. 491; *Schulenberg et al.* v. *Harriman*, 21 Wall. 44; *Leavenworth, etc. Railroad Co.* v. *The United States*, 92 U. S. 733.

The only question open for consideration in this case is, whether there is anything in the provisions of the grant under which the respondent claims to take the case out of the general rule established by these authorities. Counsel for complainant insists that, since the grant has no lateral limits, and there is no limitation of distance from the road within which the selection is to be made, the rule does not apply. I fail to see the force of this objection. The grant is of "every alternate section of public land (excepting the mineral lands as provided in this act) designated by odd numbers to the amount of ten alternate sections per mile on each side of said road, on the

line thereof, and not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time that the line of said road is definitely fixed." This seems to me to be a definite and explicit grant of all the land embraced within the ten alternate sections on each side of the line of the road, with the exceptions named. Nothing is wanting to make it definite and absolute except the definite location or fixing of the line; and there can be no doubt, in view of the decisions already referred to, that the title to the land in controversy vested in the respondent when the route was fixed and the location became certain. By the location of the line the location of the land became certain, and the title which was previously imperfect acquired precision and became attached to the land. The fact that congress did not prescribe in this grant any limitation upon the distance from the road within which the company may make selections, in lieu of lands previously sold or disposed of by the government, can make no difference in the construction of the language above quoted.

A question of greater difficulty arises under the act of April 21, 1876 (19 Stat. 35). That statute confirms "all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office in the district in which such lands are situate," etc. It is insisted that this statute is broad enough to embrace within its terms the case at bar; but it appears to me that the act, by its terms, presupposes a case in which notice of withdrawal of the lands was required by law to be given. It does not, in my opinion, apply to a case where, prior to any such pre-emption or homestead entry, the lands had been specially granted by an act of congress and had fully vested in the grantee. To give it such a construction would be equivalent to saying that congress intended to take lands from an owner whose title was perfect,

and confer them upon another. It is conceded that the line had been definitely fixed within the meaning of the act before any steps were taken by the complainant to acquire title under the homestead or pre-emption laws, and it follows from this fact, as already shown, that the title vested in the grantee, the lands being within the twenty mile limits. The act of congress was itself a grant, as well as a law, and had all the force of a patent. When the condition (the definite location of the line) was performed, the title became absolute. It cannot be supposed that congress intended, by the act of 1876, to divest titles which had previously been perfected. That act, like previous laws of a similar kind, was intended to give force and effect to the principle that, "when an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." *Lytle* v. *State of Arkansas*, 9 How. 333. But this principle applies only "where, by law or contract, the acquisition of a right is made dependent upon the performance of certain specified acts." *The Yosemite Valley Case*, 15 Wall. 91. The present case does not fall within the rule. There is nothing in the granting act requiring officers of the land department to give notice of the withdrawal of the land from market. It does not appear that such officers failed to perform any act that the law required of them respecting said grant, much less that respondent neglected to do anything required of it.

My conclusion is, that the title of respondent, under the act of congress, was perfect prior to the occupation of the land by complainant, and that therefore the complainant is not entitled to decree as prayed for.

The case will be referred, in accordance with the agreement of parties, to D. G. Hull, master in chancery of the court, to take the testimony and find the facts as to the character and value of complainant's improvements.

DUNDY, *District Judge*, concurs.

Bailey *v.* American Central Insurance Company.

(District of Iowa. August, 1881.)

1. Removal of Causes — Controversy — Pleading.— It is not necessary for a non-resident to file an answer or a demurrer in the state court before petitioning for a removal of the cause to the circuit court of the United States, especially if the petition for removal be sworn to and states that there is a controversy, etc.

This is an action to recover damages upon a policy of insurance, and was originally instituted in the circuit court of Lee county, Iowa. The defendant, a non-resident corporation, appeared in the state court at the first term after the commencement of the suit, and, without filing any other pleading, presented its petition for a removal of the cause to this court. In the petition for removal the following statements appear: "Your petitioner, the defendant, would respectfully show the court that the matter and amount in dispute in the above entitled cause exceeds, exclusive of costs, the sum of $500; that the controversy in said suit is between citizens of different states; and that the petitioner was, at the commencement of this suit, and still is, a citizen of the state of Missouri; and that the said Noah Bailey was then, and still is, a citizen of Iowa."

Good and sufficient bond being tendered, the state court sustained the motion to remove the cause, and the record has accordingly been filed in this court. The plaintiff moves to remand, upon the ground that, at the time of the filing of the petition for the removal in the state court, there was no controversy between the parties.

Hagerman, McCrary & Hagerman, for plaintiff.

Fulton & Fulton, for defendant.

McCrary, *Circuit Judge.*— The act of congress of March 3, 1875, under which this case was removed, provides for the

removal of causes "where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * in which there shall be a controversy between citizens of different states." It is insisted by the counsel for plaintiff that, inasmuch as no answer or demurrer was filed in the state court, and no issue joined, we are bound to presume that there was no controversy in the case. That there must be a controversy in order to authorize the removal is, of course, clear; and if it appears affirmatively from the record that there was no controversy, then the cause should be remanded. *Keith* v. *Levi*, 1 McCrary, 343. But we are inclined to think that, where nothing to the contrary appears, the court ought to presume from the fact that a suit has been commenced, that there is a controversy between the parties. If the defendant has made default, or if, having appeared, he has admitted the justice of the plaintiff's claim, in either case there is no controversy; but where the plaintiff has brought his suit and the defendant has appeared, and, not being in default for want of pleading, has petitioned for removal, under the act of congress, we think we are bound to presume that there is a controversy. The presumption in every case is, where a suit is brought, that there is a controversy between the parties, unless the contrary appear from the record. This was the view of the subject evidently taken by congress in the enactment of the third section of the act above cited. By that section it is provided, "That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make and file a petition in such suit in such state court *before or at the term at which said cause could be first tried*," etc. In very few if any of the states of the Union are there any statutes requiring the filing of an answer before the first term. There is no such statute in this state, and inasmuch as the act of congress expressly authorizes the petition for removal to be made before the term at which the case could be first tried, it

follows that the petition may in many cases be presented before any answer or demurrer is filed. Besides, we are of the opinion that it affirmatively appears from this record that there is a controversy. The petition for removal distinctly so states, and it is sworn to. There is certainly nothing in the statute requiring that the fact of controversy shall appear either by an answer or a demurrer. If it appears from the record, whether by the petition for removal or otherwise, it is sufficient.

The case of *Stanbrough* v. *Griffin*, 52 Iowa, 112, is relied upon by the counsel for plaintiff. In that case Rothrock, J., expresses the opinion that a removal is not authorized in a case where there is no answer or demurrer, and the record does not show that there is a controversy between the parties. The question whether the petition for removal was sufficient to show the controversy was not considered in that case; and indeed the point was not necessary to be decided, and the remarks of the judge concerning it are *dicta*. Notwithstanding our high regard for the supreme court of Iowa, we are unable to concur in the view expressed by Rothrock, J., on this question.

The motion to remand is overruled.

LOVE, J., concurs.

OBERTEUFFER and others *v.* HARWOOD, and PETIT, Garnishee.

(District of Minnesota. ——, 1881.)

1. GARNISHMENT — INTERROGATION OF GARNISHEE.— A garnishee may be required to answer questions tending to show that he was party to a fraudulent assignment by the defendant in the suit.

NELSON, *District Judge.*— The garnishee declines to answer certain questions, under the advice of his counsel, for the reason "that the line of inquiry has nothing to do with gar-

nishee proceedings," and the design is "to furnish information bearing on other litigation."

The object of the garnishee proceedings is to reach property of the debtor. It is ancillary to the original suit, and is a mode of attaching property to secure any judgment obtained against the principal defendant. A response is required to all questions tending to draw out facts that would disclose property in the possession of the garnishee which might render him liable. To this extent the inquiry may go. Whether the questions propounded are proper or not must depend upon the circumstances of each case, and no particular rules, universally applicable, can be laid down. Every question tending to further the object of the examination is material and proper.

The examination in this case shows a general assignment to the garnishee by the defendant for the benefit of creditors, and he expresses the opinion that he "had at the time of the service of the garnishee summons no property of the defendant in my possession or under my control." Such general answer is not the extent to which inquiry may go with reference to such assignment. The plaintiffs are entitled to answers to all questions which might show the garnishee a party to a fraudulent assignment. If upon "full disclosure" it should appear that the garnishee had no property, money or effects of the defendant in his possession or control, then, if the plaintiffs desire to attack the assignment for the reason that, in their opinion, it is void, they must pursue the course pointed out in section 174, p. 735, Young's Statutes of Minnesota.

The garnishee must answer the interrogatories. See Drake on Attachments, § 650, and authorities cited.

SINGER MANUFACTURING COMPANY *v.* HESTER and others.

(Western District of Missouri. ——, 1881.)

1. SEWING MACHINE AGENT'S BONDS — CONSTRUCTION OF CONTEMPORANEOUS WRITINGS.— Where there is nothing in the bond or contract of agency to show that the two instruments were to be taken as part of the same transaction, and both instruments can stand together and have full effect, parol proof cannot be introduced to limit the liability of the sureties in the bonds to transactions growing out of the agent's employment under the particular contract alone.
2. RELEASE OF BOND BY AGENT.— The expression of opinion by an agent of the plaintiffs that the execution of a new agreement between the principal and agent, by which the character of the employment was changed, released the sureties, did not amount to a contract of release, in the absence of any authority to make such a contract.

Submitted upon motion for new trial.

Action was brought upon a bond executed by defendants to plaintiff in the penal sum of $2,000, dated the fifteenth of May, 1872, and conditioned as follows: "The condition of the above obligation is such that if the above-bounden Joel Hester, Levi Oren, M. Saville and Zimri Hester, their heirs, executors or administrators, shall well and truly pay, or cause to be paid, every indebtedness or liability now existing, or which may hereafter in any manner exist, or be incurred, on the part of said Joel Hester to the said Singer Manufacturing Company, whether such indebtedness or liability shall exist in the shape of book-accounts, notes, renewals or extension of notes or accounts, acceptances, indorsements or otherwise (hereby waiving presentments for payment, notice of non-payment, protest and notice of protest, and diligence upon all notes now or hereafter indorsed, transferred, guaranteed or assigned by the said Joel Hester to the said Singer Manufacturing Company), then this obligation to be void, but otherwise to remain in full force and effect."

The petition alleges a breach of the condition of the bond, in that defendant Joel Hester did contract certain debts to plaintiff, which he failed to pay. The answer and amended

answer allege that on the sixteenth day of May, 1872, the plaintiff and defendant Joel Hester entered into a written agreement by which said Hester was appointed agent for plaintiff for the sale of sewing machines in and for the county of Holt, in the state of Missouri, said machines to be purchased of the company at Chicago, at a discount of thirty per cent. from Chicago retail prices, and to be paid for in notes payable not more than six months from their date; that said agreement was the only consideration for the execution of the bond sued on, and was part of the same transaction. It is further alleged that on the first day of May, 1873, there was a settlement between the company and its said agent under the agreement aforesaid, and that said agreement was cancelled; and on the said first day of May, 1873, a duly authorized agent of said company made and entered into a new and different agreement with Joel Hester, again appointing him agent for said company for said county, and by this second agreement the machines were to be consigned to the agent, and not sold to him (as under the former agreement); that the second agreement greatly changed, altered and increased the agent's duties, the terms of the payments and liabilities, without the consent of the sureties on said bond, whereby they were released.

These several agreements are set out in full in the answer. To the original answer, which embodied the foregoing allegations, a demurrer was interposed by plaintiff, and the same was sustained by the court. Thereupon the defendants answered further as follows: "And for further defense defendants say that on the first day of May, 1873, said plaintiff and said defendant Joel Hester entered into a new agreement with respect to the matters contained in the writing obligatory set out in plaintiff's petition, and that, in consideration of said new agreement, and that defendant Joel Hester would execute and enter into the same, the plaintiff agreed to and did release defendants from any further liability on said writing obligatory, and did then and there terminate and rescind the same;

and defendants aver that no part of the indebtedness of said Joel Hester to plaintiff was contracted before the said writing was rescinded."

Upon this allegation issue was joined, and, after the testimony was all in on both sides, the court instructed the jury to find for plaintiff. A motion is now made for a new trial upon the ground that the demurrer to the original answer was improperly sustained, and upon the further ground that the issue joined upon the amendment above quoted should have been left to the jury. This motion has been considered by the full bench, at the request of Judge Krekel, who presided at the trial.

Botsford & Williams and *Mack J. Leaming*, for plaintiff.

L. H. Waters and *James Limbird*, for defendants.

McCrary, *Circuit Judge.*—1. It is insisted that the bond sued on, and the original contract by which defendant Joel Hester was appointed as agent for plaintiff to sell sewing machines, were entered into at one and the same time, and are parts of the same transaction, and that therefore they should be construed together as constituting one contract; and it is said that, being so construed, the liability of the obligors upon the bond should be limited to the transactions embraced within the contract. That the two instruments were intended to be and were parts of the same transaction does not appear from anything contained in either. So far as we can gather from the contents of the papers themselves, they were separate, distinct and independent. It is more than doubtful whether, in such a case, it can be shown by parol that the parties intended anything more or less than appears from the terms of the writing. If, however, it were competent in this way to explain this writing, it certainly would be a violation of long settled rules to admit parol proof to add to or vary the terms of the written instrument, and this was in effect what was attempted. The bond binds the obligors "to pay, or cause to be

paid, any and every indebtedness or liability now existing, or which may hereafter in any manner exist, or be incurred, on the part of said Joel Hester to the said Singer Manufacturing Company." The contract contains nothing to the contrary of this. The effort is, therefore, to show by parol that which is in contradiction of the bond, viz.: that it was to secure, not all debts contracted by Hester of any and every kind, past or future, as it plainly says, but only to secure such as might grow out of the contract of agency. To admit such proof would be to vary by parol the terms of a written instrument. *Bush* v. *Bank*, 101 U. S. 93; *Sewing Machine Co.* v. *Webster*, 47 Iowa, 357; *Insurance Co.* v. *Sedgwick*, 110 Mass. 163; *Frank* v. *Edwards*, 8 Exch. 214.

2. Even if we read the two instruments together as one contract, the terms of the bond are not varied or modified. The two instruments can stand together, and the provisions of each can have full effect. Because in the contract Hester was appointed agent for plaintiff, with certain powers, duties, rights and liabilities, it does not follow that it was not the purpose to make the bond sufficiently comprehensive in its terms to cover that as well as other transactions. The terms of the bond are too plain to be misunderstood. They are not ambiguous, and, in the absence of an allegation of fraud, accident or mistake, we must give them effect according to their usual and ordinary acceptation. It follows from these considerations that the demurrer to the original answer was properly sustained.

3. It only remains to consider the question whether the instruction given by the court to the jury to find for plaintiff was proper. It is insisted by defendants' counsel that the question whether the plaintiff agreed to rescind the bond in consideration of the execution of the second contract by the agent, Hester, should have been submitted to the jury.

There was testimony tending to show that an agent of plaintiff was present at the time of the execution of the second agreement between the company and Hester, and that

he expressed the opinion that the effect of it would be to release the sureties of the bond. There was no testimony tending to show that the agent agreed or stipulated that the sureties should be released, nor was there any testimony tending to show that he had any authority from the company to make such an agreement. The expression by the plaintiff's agent of the opinion that the legal effect of the new agreement would be to release the sureties on the bond did not (especially if not acted upon by the sureties so as to change their legal rights) amount to a release. There was, therefore, no evidence upon which a verdict for the defendants could have been sustained. In such a case an instruction to the jury to find for the plaintiff is proper. *Pleasant* v. *Faut*, 22 Wall. 116.

The motion for a new trial is overruled.

KREKEL, *District Judge*, concurs.

BARNEY and others *v.* WINONA & ST. PETER RAILWAY COMPANY.

(District of Minnesota. December, 1880.)

1. GRANT OF LAND TO THE TERRITORY OF MINNESOTA TO AID IN THE CONSTRUCTION OF RAILROADS — INDEMNITY CLAUSE — ACT OF MARCH 3, 1857 — SELECTION OF INDEMNITY LANDS — ACT of MARCH 3, 1865 — ACT OF JULY 13, 1866.

In equity.

MILLER, *Circuit Justice.*—1. I am of opinion that, by the true construction of the act of congress of March 3, 1857 (11 Stat. at Large, 195), granting lands to the territory of Minnesota, the indemnity clause was intended to include alternate sections within the prescribed limit which had been sold by the United States, or lost by pre-emption prior to the date of the grant, as well as such as might be sold between that time and the loca-

tion of the road. And, without further comment on the cases of *L., L. & G. R.* v. *U. S.* 92 U. S. 733, and *B. & M. R. R. Co.* v. *Same*, 98 U. S. 339, I do not believe the court in those cases intended to establish a different doctrine.

2. I am of opinion that, in the selection of these indemnity lands, there is no restriction to coterminous sections of twenty miles in length of the road, except as that may have been affected by the short period between the passage of the act of March 3, 1865, which did appropriate the lands in place to the construction of coterminous road, and the passage of the act of July 13, 1866, which exempted from that rule lands selected in lieu of those deficient anywhere. If any of the lands now claimed were certified or patented to the company for work done during that period, they cannot be treated as patented in lieu of lands deficient in other sections of ten or twenty miles.

I think the other questions were settled by Judge Dillon; and Judge Nelson can settle a decree accordingly.

NELSON, *District Judge.*— I concur.

BROWN *v.* DEERE, MANSUR & Co. and others.

(Eastern District of Missouri. January, 1881.)

1. INVENTION — ROTATORY SEED-WHEEL.— The substitution of an intermittent rotatory seed-wheel for an oscillatory seed-wheel, with the addition of the devices necessary to effect such rotatory motion, constitutes a valid and important improvement.
2. SAME — DIVISION INTO DISTINCT CLAIMS.— The supreme court having held divisional patents valid, there can be no legal objection to subdividing an invention into distinct claims.

In equity.

TREAT, *District Judge.*— The only questions calling for especial attention are: *First*, was the patent for an improvement issued in 1865 valid? Of this the court has no doubt; for

instead of an oscillatory seed-wheel, an intermittent rotatory wheel was substituted — the intermittent rotatory operations, in combination, to be effected by the devices stated, namely, the forks on the transverse bar contrived with checks, so that the wheel could be rotated intermittently, and stopped at each discharge of the seed in the check-rows. *Second.* Is the re-issue No. 6,384 valid? It contains three claims. To understand them, it is necessary to consider what was included in the improvement of 1865, and not only what was the state of the art when the patents of 1853 and 1855 were issued, but also of 1865. All that was included in the patents of 1853 and 1855 are abandoned to the public; and hence the improvement patent of 1865 and its re-issue must rest for present validity, or rather for infringement, upon the violation of the lawful rights of the plaintiff, which were acquired under said patent of 1865 and its re-issue. Is the re-issue, as to each of its three claims, within the terms of the original patent of 1865?

It is clear that the substantial improvement consisted in a new device, which, in combination with former devices, would produce an intermittent rotatory motion, with described checks, instead of an oscillatory motion of the seed-wheels. In the re-issue the matters invented or suggested in the patent of 1865 are divided into three distinct claims. As the United States supreme court has held divisional patents valid, there can be no legal objection to subdividing the invention into distinct claims. So far as the present inquiry is concerned, there is nothing new in horizontal reciprocal seed-wheels, a transverse reciprocating bar, and a hand-lever, operated in combination, nor was there in said combination operating in connection with the valve in the seed-tube. Now, if an intermittent rotatory seed-wheel was substituted for an oscillatory wheel, and devices given for effecting such rotatory motion, consisting of forks on the transverse bar and checks on the wheel and bar, constructed as described, a valid and important improvement was made. Such was the scope of the patent of 1865.

The re-issue subdivides that invention into three claims: *First*, the combination of the peculiar wheel and transverse bar with a hand-lever, so as to produce the intermittent rotatory motion, substantially as, etc. Here is an introduction into old machinery of a new and peculiar wheel and forked transverse bar, whereby, in combination with well-known devices, the desired result could be produced — a new combination. *Second*, the combination of the described forks and toothed wheels to operate as stated. That combination shows the general structure of the forks and of the wheels and of the checks, whereby the intermittent rotatory motion was produced and stopped at each discharge of the radial seed-cups through the seed-valves. No similar combination existed previously, and as to some of the devices they were entirely new. *Third*, this claim, unless limited to the devices used in the combination, would be too broad, and therefore void. It is for a combination, literally interpreted, of *any* horizontal rotating seed-wheel in the hopper and valve in the seed-tube, a transverse reciprocating bar and operating hand-lever. Such a combination is open to more than verbal criticism. When, however, the recognized rules of interpretation in such cases are brought to bear, we find that this claim differs from the others only in making the rotatory wheel operate the seed-valve. Said valve had previously been operated in connection with the oscillatory wheel, bar and lever. Hence, the introduction of the intermittent rotatory wheel, the forks on the transverse bar, and the checks or stops at certain points, enabled the three combinations to be effective in their respective operations, separately considered. Each of those claims is therefore held to be valid. As to the infringement, much might be said if the court had at its command the appliances whereby, through models and drawings, it could make its views clearly appear as to details of mechanical contrivances. In the absence of such aid it would be useless to attempt a detailed description thereof. It must suffice to state that the defendants infringe each of the plaintiff's claims, limiting

them to the use, in combination, of the devices specified. The combinations are the same, and the devices used are the same, with merely colorable change as to form. The forks, seed-wheels and checks exist in the patent and in defendants' machines in combination, substantially as set forth in plaintiff's patent.

A decree will be entered for the plaintiff accordingly, with reference to the master, Thomas C. Reynolds, to report the amount of profits and damages.

Brown *v.* Deere, Mansur & Co.

(Eastern District of Missouri. February, 1881.)

1. Infringement — Suspension of Interlocutory Decree — Power of Court.—The suspension of an interlocutory decree, perpetually enjoining the infringement of a patent, until an accounting can be had and a decree entered from which an appeal can be taken, rests in the discretion of the court which granted the decree.
2. Same — Same — Same.— In the exercise of such discretion the court should look carefully to all the facts and circumstances involved, regarding the difference between royalties, licenses and patent monopolies.
3. Motion Overruled.— Motion to suspend the interlocutory decree for a perpetual injunction overruled under the circumstances of this case.

George Harding and *John R. Bennett*, for plaintiff.

West & Bond and *S. S. Boyd*, for defendants.

Treat, *District Judge.* — On the hearing of this cause upon the merits, it was decided that the plaintiff's patent was valid, and that the defendants had infringed the same. A motion for rehearing is now presented substantially on the ground that the defendants have discovered since said hearing proofs of prior use and anticipations of plaintiff's patent, invalidating the same. The motion looks to setting aside the decree and permitting an amended answer to be filed, in which the newly discovered matter may be interposed. To that mo-

tion there are valid objections: *First*, under the rules governing such cases, the time within which such defenses can be presented is prescribed by law. No adequate excuse is given for the non-presentation of the alleged defenses within the prescribed time. *Second*, so far as the motion and accompanying affidavits disclose, there is no adequate reason, even if the supposed new matter had been presented in time for changing the decree.

The parties in this case had been at issue for about two years, and, after mutual indulgence as to the date of hearing, the cause was finally presented to the court upon the evidence submitted, with elaborate arguments by respective counsel. Ample opportunity had been given to the parties and counsel, and, now that a decree has been ordered, if the case is to be opened, new pleadings introduced, with the necessary delay as to the taking of evidence thereunder, the probability is that the patent will, in the meantime, have expired. The patent in question has only one year to run, which, if wasted in litigation, leaves the patentee no direct benefit from its existence, but remits him only to profits, damages, etc., recoverable from the infringers.

This court has already passed upon the main issues as made by the pleadings and evidence, and there is no sufficient ground for the motion to rehear or open the case in order to let in new pleadings, etc. The motion for rehearing is overruled.

There is another motion calling for grave consideration, viz., to suspend the injunction ordered after a full hearing, so that the defendants may not have their business destroyed pending the account with a view to a final decree, from which decree they intend an appeal with a *supersedeas*. They now offer to give a bond in any sum the court may name if a suspension of the injunction order is granted until the case has ripened into a final decree from which an appeal can be had.

The grounds of the motion are substantially that, before the hearing and decree of the court, defendants had entered into

a large number of contracts to furnish their corn-planters to agriculturists in several states, and that there is not adequate time for them to reconstruct their machines so as to avoid the infringement as found without disappointing their customers, and fastening upon themselves large damages for non-fulfillment of their many contracts.

The first inquiry relates to the power of the court to grant the motion. It must be remembered that, after a full hearing on the merits, it has been decided that defendants are infringers, and all that remains for a final decree is the ascertainment of the sum of money to which defendants shall respond. Pending proceedings for the ascertainment of that sum, it is asked that the injunction be suspended so that the defendants may continue to infringe, upon giving bond to answer in damages, etc., if it be finally determined on appeal that they are liable.

The underlying thought has often occurred to this court with respect to both equity and admiralty cases; and it has sought in vain to rescue litigants from the obvious mischief to ensue if its decisions should be finally reversed. Still, the United States supreme court has held, and still holds, that no case can pass under its supervision until final judgment, which final judgment, in equity or admiralty, is not when the main question as to liability is determined, but when the case is finally closed, including damages, etc., whereby the measure of liability is also ascertained. The grounds of these decisions are familiar and of great force. Cases should not go to that tribunal in a fragmentary way; that is, it should not be required to pass upon the interlocutory decrees or judgments of the lower courts, and then have subsequently to adjudicate in the same cases supplementary questions.

Such being the rule as to appeals, what remedy has a defendant intermediate the interlocutory and final decree? He may be positive in his conclusions that the court below has committed a grave error which the appellate tribunal will correct, yet great or irreparable damage will ensue if in the

intermediate time the judgment of the court is not stayed—not intermediate the final decree and the decision of the supreme court against which a *supersedeas* can be had, but intermediate the interlocutory and final decree of the lower court.

On the other hand it is urged, as in this case, that a court of competent jurisdiction having decided that an infringement exists, it should not tolerate the continuance of such an infringement to the destruction, it may be, of plaintiff's rights, because the defendant, perchance, may, at a proper time, take an appeal. It is to be presumed that each court has full confidence in its own judgment, yet is solicitous for a full review, and will give the amplest opportunities therefor. But there is an intermediate stage of the litigation to be considered.

If the trial court has, on mature consideration, given its judgment, shall it forego it because at some indefinite time thereafter an appeal may be taken? Suppose it suspends its judgment and no appeal is taken, who shall remedy the mischief thus produced? The plaintiff ought not to be left unprotected, in whose favor a decision has been had, and on the other hand the defendant ought not to be deprived of his right to an appeal. The law clearly provides for all cases except that under consideration, viz., the intermediate stage between the decree for a perpetual injunction and the accounting necessary for a final decree, from which alone an appeal can be had.

The attention of the court is called to the following cases, in some of which strong *dicta* are given, and in others positive decisions made: *Barnard* v. *Gibson*, 7 How. 658; *Dorsey Harvester Co.* v. *Marsh*, 6 Fisher, 401; *Bliss* v. *City of Brooklyn*, 4 Fisher, 597; *Morris* v. *Lowell Manuf'g Co.* 3 Fisher, 51; *Sanders* v. *Logan*, 2 Fisher, 170; *Kirby, etc.* v. *White*, 1 Fed. Rep. 604; *Potter* v. *Mack*, 3 Fisher, 386; *Whitney* v. *Mowry*, 3 Fisher, 175.

These are noted among the many cases cited, because they sufficiently establish the rule by which the lower court should

be governed, and, so far as seen, no well considered case is in conflict therewith. The distinction between the doctrines governing a motion for preliminary injunction and the suspension of an interlocutory decree for a perpetual injunction, after full hearing on the merits, must be carefully observed. The force of these authorities is, as right reason exacts, that each court should, according to the facts presented, decide whether, in justice to the parties, the interlocutory decree should be suspended until the final determination of the suit or take immediate effect. If such be the true rule, what is the rightful application in this case? This suit has been pending for two years or more, each party confident that the decision would be in his favor. In the meantime each has proceeded accordingly. The plaintiff had not for many years pushed his invention or put its products on the market. Occasionally, and to a limited extent, he had manufactured and sold his rotary seed droppers, but relied mostly on his oscillatory machine. In the meantime the defendants and those with whom they are associated had put upon the market their machines and built up a large trade. It is unnecessary now to discuss the relative merits of the respective machines.

One fact, however, has not escaped the attention of the court, viz.: that the plaintiff seemingly attached very little value to his patent until the defendants and their associates introduced and popularized plaintiff's patent. Still the plaintiff's rights exist and must be protected. The defendants knew the pendency of this suit, and that it was ripe for hearing; that it could be set down for hearing at the instance of either party before the defendants made any of the contracts named in either affidavit. They are vendors of the infringing machines, and pending this suit, and while it was ready for final hearing, they entered into contracts to furnish the same, the nonfulfillment of which will subject them to serious damage. Does that fact present any just ground for permitting them to continue their infringement? Were not those contracts in their own wrong? The plaintiff submits affidavits to the effect

that he is prepared to supply the trade to some, if not to the full, extent of the demand. This is not a case where the patentee relies upon the sale of licenses or a royalty, but where he maintains his monopoly both as manufacturer and vendor. The patent has about a year to run. All that he can derive therefrom must come to him through his monopoly within that time. Hence the importance to him of having the interlocutory decree take immediate effect. Some courts in special cases seem to place stress on the fact that the life of a patent is about to expire, when asked to suspend the operation of an interlocutory decree; their judgments, it is to be supposed, resting upon the thought that the injury to the plaintiff must be slight, for which full compensation can be given, while on the other hand the defendant may be largely damaged if he is not permitted to continue his infringement for the brief interval prior to the termination of the patent. Can such considerations affect questions of right? Will a court permit a wrong to continue because the continuance of the wrong, if not stopped, will soon come to an end? The fact that a plaintiff's monopoly is about to expire makes it the more important that he should enjoy it unmolested during its brief continuance.

There are some aspects of this case which incline the court, if it could be done within legal rules, to grant the motion made by the defendants; but having determined on full hearing what are the respective rights of the parties, it discovers nothing in the affidavits to justify any suspension of the injunction ordered.

An additional suggestion should be made. If the defendants give bond and pursue their infringements pending the account to be taken before the master, when will that accounting be closed, so that a final decree can be entered? As the decree now stands, with a perpetual injunction, the account relates to prior damages, etc. What shall be done with respect to the continually recurring damages if the injunction is suspended? If the master reports, as to the past,

dating from the interlocutory decree, what decree shall be finally entered as to damages accruing subsequently thereto? When is a final decree to be entered, so that an appeal can be had, and what shall that decree include? Must there be a new accounting ordered as to the continuing infringement? This court must make a final decree at some time, and if it permits the infringement to continue on bond given, when will it finally dispose of the case? So long as, under its permission, the infringement continues, constantly recurring damages are suffered to accumulate.

These suggestions are made to indicate the legal and practical difficulties involved in the question, and to show that under the rule heretofore stated the court should look carefully to all the facts and circumstances involved, before granting a motion to suspend its interlocutory decree regarding the difference between royalties, licenses and patent monopolies.

The views of this court with respect to preliminary injunctions have been repeatedly announced, and in one case as to an interlocutory decree. In the latter case the thought was that after an interlocutory decree as to a product, the infringer should not be permitted to put on the market an inferior product to the detriment of the plaintiff, whereby not only a competition should occur in the market, but the inferior product disparage the true product. That case can have no adequate reference to this; for it may be that the defendants' machines are, as to practical utility, superior to those manufactured by the plaintiff; still the patentee is entitled to what the law grants, and if any difficulties occur, as suggested, they are to be corrected by legislation, and not by judicial decision.

The decision of the court, therefore, is that the motion for rehearing is overruled, and the motion to suspend the interlocutory decree for a perpetual injunction is also overruled.

GAINES *v.* HAMMOND'S ADM'R.

(Eastern District of Missouri. February, 1881.)

1. STATUTE OF LIMITATIONS — LETTERS OF ADMINISTRATION — MISSOURI. The bar of the statute of limitations (Missouri) is not removed by the issuance of letters of administration upon the estate of the deceased debtor.
2. SAME — SAME — SAME. — This rule is not modified by the fact that it was not known that the decedent had any estate calling for administration until after the expiration of the statutory period of limitation.
3. SAME — LITIGATION WITH THIRD PARTIES. — Such statute does not cease to run merely because the creditor is involved in litigation with third parties, upon which her individual right to the debt is dependent.
4. SAME — SUCCESSIVE COVERTURES. — Such creditor cannot tack her subsequent disabilities by successive covertures in order to prevent the operation of the statute of limitations.
5. UNIVERSAL LEGATEE UNDER VALID WILL — EXECUTORS UNDER VOID WILL — JUDGMENT. — *Quære*, whether a universal legatee under a valid will has any interest in a judgment obtained by the executors of a prior void will.
6. DECEDENT'S ESTATE — ADMINISTRATION — GRANT TO REPRESENTATIVES. — *Quære*, whether a grant by the United States to the representatives of a decedent of a tract of land claimed by the decedent, and taken in execution for his debts, but to which he had in fact no legal title during his lifetime, could be treated as the individual estate of such decedent, and subjected to administration.
7. STATUTE OF LIMITATIONS — VOID SALE — PURCHASERS. — *Quære*, whether, under the circumstances of this case, after the expiration of more than half a century, lands could be recovered from purchasers under a void sale.
8. PRIOR KNOWLEDGE OF THE FACTS — BILL FILED IN 1848. — *Held*, that it appeared from a bill filed in the court in 1848 that the plaintiff was fully informed of all the facts which it is now averred she did not discover until a date long subsequent.

In equity.

This is a demurrer to a bill in equity. The bill alleges as a ground for equitable relief, in substance, the following facts: Complainant is the daughter of Daniel Clark, and the devisee of all his property by his will executed in 1813. She was born in 1806, but was brought up in the family of one Davis, with whom she resided in New Orleans until 1812, when she went with them to Philadelphia. She was married in Phila-

delphia to one Whitney, in 1832. Whitney died in 1838. In 1845 she married General Gaines, who died in 1858. She only discovered her true parentage in 1834. Of the will under which she took she was also ignorant until then, and for more than thirty years thereafter she was engaged in lawsuits, by which she finally was able to prove the authenticity of the will of 1813, finally established. Clark died in 1813. A will executed in 1811 was probated as his last will, and Relf and Chew, as executors, acted under it for many years. Among other things, Relf and Chew appointed defendant's intestate, Hammond, to sell certain lands in Missouri. Hammond did so, but converted a part of the money derived from the sales to his own use in and before April, 1819. Suit was brought to recover the sum due in April, 1819, and judgment was rendered for Relf and Chew in August of that year for $6,841.80, which was affirmed on appeal in 1823, and certain property was sold on execution as land belonging to Hammond in October, 1823. This land was bid in by Relf and Chew, and was sold by them to various persons, who held possession of it for many years. No title passed, however, to Relf and Chew at the sale on execution, because the interest which Hammond had in the land was simply a New Madrid claim, and no return was made as required by the act of 1822. There were other reasons also why no title passed. Hammond, it is alleged, absconded from Missouri in December, 1824. He died in Maryland in 1842. No letters of administration were granted on his estate until 1879. The title to the land above mentioned remained in the United States until June, 1864, when it was granted by the government to Joseph Hunot or his legal representatives, or, in other words, to the representatives of Hammond. This fact was not known to complainant until 1879, when the supreme court of Missouri held that Hammond's representatives were entitled to the property, and that the representatives of Relf and Chew obtained no title thereto whatever under the execution sale in 1823. Hammond had no other property. The bill alleged that Relf and Chew

were executors in their own wrong; that complainant only had a right to the money converted to Hammond; that the judgment against him is evidence of the fact of his receiving and converting the money, and that, under the facts, she is entitled to judgment for the money converted, with interest, for which she prays. The bill sought to state ground of excuse for a failure to bring suit before, alleging the absconding of Hammond from Missouri; that no letters had been taken out on his estate before 1879; complainant's difficulty in establishing her rights under Clark's last will; the fact that Hammond's estate never was seized of the property until 1879; and her ignorance that Hammond had any title whatever to the land until that year. The demurrer was both general and specific, and raised the question whether the claim was not barred by the statute of limitations of Missouri territory and state, allowing only *five years* for the bringing of an action like the present one.

Britton A. Hill and *N. Oscar Gray*, for plaintiff.

Cline, Jamison & Day and *D. T. Jewett*, for defendant.

TREAT, *District Judge.*—I commenced to write an elaborate opinion, but found it expanding to such an extent, that, for want of time, I abandoned the purpose. The case, as presented, involves many serious questions, if considered *seriatim*, but there is one controlling view which disposes of the whole matter.

The plaintiff was *sui juris* more that fifty years ago, and if she succeeded (which is doubtful) to the rights of Relf and Chew under the judgment of 1819 in their favor, no adequate reason has been assigned in law or equity for her failure to pursue her rights thereunder prior to 1879 or 1880. If she cannot have the benefit of said judgment in her own right, she is in a still worse condition. Relf and Chew, under the will of 1811, have been found, judicially, to have acted without authority; for said will, after protracted litigation, was

held to have been superseded by the will of 1813. Hence, what Relf and Chew did, and what their agent, Hammond, did, was void, or voidable, as against said persons; and she has slept on her rights, if she had any, for more than fifty years.

But it is contended that, as Hammond absconded from Missouri in 1824, and died in 1842, and it was supposed his interest in the Hunot tract had been disposed of under the sheriff's sale in 1819, it was not known that he had any estate calling for administration till 1879.

Hammond had what is termed a New Madrid claim, upon which levy had been made under the judgment of 1819. That claim came to naught for failure to make the return required by the act of 1822. For that and other reasons stated by the supreme court of Missouri, nothing passed to the purchasers at the sheriff's sale under the judgment of 1819.

If Hammond owed anything to the Clark estate, she had a right to pursue her demand as soon as she attained her majority, and cannot tack her subsequent disabilities by successive covertures to prevent the operation of the statute of limitations. Hence, if she claims that said judgment inures to her benefit there are two complete defenses thereto: *First*, the statute of limitations; *second*, the presumption of payment after the lapse of fifty years. If her demand is on an open account against Hammond, and she is willing to waive his unauthorized action and treat him as her agent, that demand accrued as early as 1819, and he has been dead, so far as she is concerned, for nearly thirty-eight years before this suit was brought.

It is claimed that, inasmuch as no administration was taken on Hammond's estate until 1879, the plaintiff has the statutory period after letters of administration to establish her demand, however stale. I do not so read the Missouri decisions cited, and if they asserted any such doctrine there would be an end indefinitely to statutes of repose in case of death and failure to administer. The administration statutes require

claimants to present their demand within the times stated, or stand barred. They do not revive claims previously barred by the statutes of limitation. I so understand the supreme court of Missouri to hold — a ruling in conformity with well recognized doctrines on that subject.

It seems that Hammond, under the rulings of the United States supreme court, had no such interest in the Hunot tract that, during his lifetime, he could have maintained ejectment therefor, or that could possibly have been reached by execution. By the special act of congress in 1864, there was confirmed to him and his legal representatives the Hunot tract; that is, about twenty-two years after his death. Whatever may have been subsisting demands against him prior to his death, subject to be enforced through administration on his estate, it might be a grave question whether the grant of 1864 could be treated as his individual estate, subject to administration. At the time of his death neither he nor the purchasers at the sheriff's sale in 1819 had any legal interest in the Hunot tract. All interest he might have had in the same was barred in 1823 through his failure to comply with the act of 1822.

Thus matters stood until congress, twenty-two years after his death, confirmed to his legal representatives the tract spoken of. It has been held that, even taking the broadest view of the doctrines laid down in *Landes* v. *Brant*, Relf and Chew took nothing under the sheriff's deed of 1819, much less this plaintiff. It seems that other parties in interest, through protracted litigation, ascertained in 1879 that the only legal representatives of Hammond under the act of 1864 were his heirs. So soon as that fact was thus judicially ascertained, the plaintiff caused administration to be had on Hammond's estate, about thirty-seven years after his death, in order to prove up, it may be, a judgment to which she was not a party, rendered about sixty years before, or on an open account, which, by waiving the original wrong, she might have had established in 1819, or at least so soon as she became *sui juris*, more than

fifty years ago. The bill, however, recites what has almost become judicial history through the various decisions of many courts, and notably three by the United States supreme court, to wit: the long and painful struggle of the plaintiff to have her father's will of 1813 established, and her rights recognized thereunder, which struggle culminated in her favor before the act of 1864 referred to. *Gaines* v. *Hennen*, 24 How. 553. Who was responsible for this long delay? Hammond's position was, however, readily ascertainable from 1819. The plaintiff might, if she had any rights against him, have pursued them before 1830, and prior to Hammond's death. Because she was involved in a legal controversy with others, did the statute as to Hammond cease to run, whereby, after the lapse of more than half a century, she can pursue the Hammond estate? If so, then every person not a party to a suit must be held bound by its outcome, despite the statute of limitation; and thus the statutes of limitation become futile.

Reference has been made to certain decrees and judgments entered in favor of plaintiff by the United States circuit court in Louisiana. The facts and circumstances under which those decisions were had are unknown to this court. The cases seem to have been for the recovery of the possession of realty devised to her under the will of 1813, despite the sale made by Relf, Chew and Mary Clark under the will of 1811. So, here, the property belonging to Daniel Clark's estate, sold by Hammond prior to 1819 (he acting as agent for Relf, Chew and Mary Clark), may in law belong to this plaintiff, unless her rights thereto are barred; but she is not seeking to recover said realty, but the amount paid to Hammond for said void transfers. It may be that the statute of limitations would bar any suit against the purchasers from Hammond; but, whether such be the fact or not, it is not seen how she can recover from Hammond's heirs the money judgment claimed by her, and have the same made a charge upon the lands which came to his heirs under the act of 1864. Again, her excuse for not proceeding in this matter at an earlier date, even if

the same were valid, is met by the fact that in 1848 she filed a bill in this court wherein it appears that she was fully informed of all the facts that it is now averred she did not discover until a date long subsequent. In no possible view of the case, as presented by the bill, has she any right to maintain the same.

The demurrer is sustained and the bill dismissed.

First National Bank of Omaha *v.* The Mastin Bank and Kersey Coates, Assignee.

(Western Division Western District of Missouri. October, 1880.)

1. Mistake of Fact — Equitable Relief.— The plaintiff, by reason of a mistake of fact, sent to a bank in New York to be credited to the Mastin Bank, more money than was due the latter. *Held*, that plaintiff was entitled to recover back the excess, and may in equity pursue and recover the proceeds wherever he can find them, unless they have passed into the hands of an innocent holder.
2. Same — Rights of Assignee.— The Mastin Bank having made an assignment for the benefit of creditors, *held*, that plaintiff may recover against the assignee who took the assets subject to the equities existing against them in the hands of said Mastin Bank.

This case is submitted to the court for final decision upon an agreed statement of facts, from which it appears that the plaintiff and the Mastin Bank, between July 1 and August 1, 1878, had maintained a correspondence and account, and had remitted to one another divers sums of money, and also demands, notes, bills and accounts against third parties for collection and credit. On the twenty-seventh of August, 1878, the Mastin Bank, then having a considerable balance in the hands of the plaintiff, directed the plaintiff to remit said balance to the Metropolitan National Bank of New York, to the credit of the Mastin Bank, in even hundreds of dollars. At the time the books of the plaintiff showed a balance due the Mastin Bank of a little more than $8,800; and accordingly the plaintiff re-

mitted to the said Metropolitan National Bank of New York $8,800, to be placed to the credit of the Mastin Bank. Prior to that time, however, the plaintiff had sent to the Mastin Bank for collection a draft drawn by one Faut for $3,141, which said Mastin Bank had collected on the seventeenth of July, and duly credited the plaintiff on its books; but the plaintiff, by mistake, omitted to charge the said sum to the Mastin Bank, and therefore sent to the Metropolitan National Bank a larger amount of money than was due to the Mastin Bank. A few days after this transaction the Mastin Bank failed and made an assignment to the respondent, Kersey Coates, assignee, under the laws of the state of Missouri, transferring to him all its property and credits of every kind whatsoever. The assignee demanded and received from the Metropolitan National Bank the money held by it to the credit of the Mastin Bank, including the sum which plaintiff had sent to it by mistake, and which it is agreed amounts, less certain credits, to $1,816.22. Plaintiff, as soon as advised of the mistake, demanded the return of the money from the Mastin Bank, as well as from the Metropolitan National Bank, and also made the same demand upon the assignee after his appointment.

J. M. Woolworth, for complainant.

Pratt, Brumback & Ferry, for respondent.

McCrary, *Circuit Judge.*—The fact is admitted by the agreed statement that plaintiff sent to the Metropolitan National Bank in New York, to be placed to the credit of the Mastin Bank, the money now in controversy in consequence of a mistake of fact. When plaintiff stated the account in order to ascertain the sum to be sent to the New York bank, one item thereof was omitted by reason of an error of the accountant, or because the bank had not received notice at that time of the collection, by the Mastin Bank, of the Faut draft. The result of the transaction was that the plaintiff sent to the

Metropolitan National Bank, to be credited to the Mastin Bank, more money than was due to the latter; or, in other words, there was placed in the hands of said Metropolitan National Bank $1,816.22 which did not, in equity, belong to the Mastin Bank. It was, however, placed to the credit of that bank, and after the assignment it passed into the hands of the assignee.

As between the original parties to this transaction it cannot be claimed that the Mastin Bank acquired any interest in or right to the money now in dispute. It is a principle of equity too plain to require a citation of authorities to support it, that where one person, by mistake, delivers to another money or property without consideration, he may recover it back; and where the identical property cannot be found and recovered, equity permits him to pursue and recover the proceeds wherever he can find them, unless they have passed into the hands of an innocent holder. Where both parties intended the delivery of a particular sum of money, and where, by the mistake of both, a larger sum was delivered, the party receiving the excess becomes, in equity, a trustee for the real owner thereof and bound to deliver it upon demand to him. The ground upon which this rule proceeds is, that mistake or ignorance of facts is a proper subject of relief when it constitutes a material ingredient in the contract or acts of the parties, and disappoints their intention by a mutual error, or where it is inconsistent with good faith, and proceeds from the violation of the obligations which are imposed by law upon the conscience of either party. Story's Equity Jurisprudence, sec. 151.

It is equally clear that the plaintiff has a right to relief against the assignee who claims by a general assignment under the laws of Missouri, for the reason that the assignee is deemed to possess the same equities only as the debtor himself would possess. Story's Equity Jurisprudence, sec. 1228.

It is my opinion that upon the principles of equity the plaintiff is entitled to recover the sum of money in controversy in this suit, and decree will be entered accordingly.

SMITH and others *v.* SCHWED and others.

(Western District of Missouri. ——, 1881.)

1. FEDERAL PRACTICE — REMOVAL — BILL FILED IN STATE COURT — VERIFICATION — INJUNCTION.— Upon the removal of a cause from a state court an injunction will not be dissolved upon the ground that the bill filed in such court was not verified according to law and the practice of courts of chancery.
2. EQUITY PLEADING — FRAUDULENT JUDGMENT — INJUNCTION.— A bill to enjoin the execution of a fraudulent judgment need not aver that the plaintiff in such judgment is insolvent.
3. FEDERAL PRACTICE — REMOVAL — INJUNCTION.— Upon the removal of a cause the federal court can maintain an injunction obtained in the state court.

In equity. Motion to dissolve injunction.

It is provided by statute in Missouri that "any attaching creditor may maintain an action for the purpose of setting aside any fraudulent conveyance, assignment, charge, lien or incumbrance of or upon any property attached in any action instituted by him." The cause was removed by complainants.

Bryant & Holmes and *Tichenor & Warner*, for motion.

Botsford & Williams and *Scarritt & Riggins, contra.*

MCCRARY, *Circuit Judge.*—The complainants, who are creditors of the firm of Schwed & Newhouse, merchants in Kansas City, Missouri, filed their bill in the circuit court of Jackson county, Missouri, praying that a certain judgment confessed by said Schwed & Newhouse in that court in favor of one H. Heller, of Philadelphia, Pennsylvania, for $9,572, rendered on the twenty-sixth day of January, 1880, be cancelled and set aside.

The bill charges that the said judgment was fraudulent, and was confessed for the purpose and with intent to defraud, hinder and delay the *bona fide* creditors of Schwed & Newhouse, who were not indebted to said Heller in said sum of $9,500, or any other sum, at the time of the fraudulent con-

fession, but that said judgment was confessed without any consideration, and for the purpose aforesaid.

It is further alleged that execution has been issued upon said judgment and levied upon the only property of said Schwed & Newhouse within the state of Missouri, to wit, a stock of watches and jewelry, and that attachments in favor of plaintiffs have been levied upon the same property. After the filing of the bill in the state court, and after all the defendants had appeared, a motion for a temporary injunction to restrain the execution of said judgment was heard by that court, and an injunction allowed to remain in force until a final hearing of the cause. Afterwards the cause was removed to this court. The defendants here move to dissolve the injunction granted by the state court upon grounds which will now be considered.

1. It is said that the bill is not verified according to law and the practice of courts of chancery. It is to be presumed that all questions relating to the form and sufficiency of the bill, and of the verification thereof, were considered and decided by the state court upon the hearing before that tribunal of the motion for an injunction, and that the affidavit was held to be good and sufficient under the state law. Whether that ruling was correct or not I will not inquire, because this court is not called upon to review the orders and ruling made by the state court in the progress of the cause before the removal. In the case of *Dungan* v. *Gegan*, 101 U. S. 810, the supreme court, by Waite, C. J., laid down the rule upon this subject as follows: "The transfer of the suit from the state court to the circuit court did not vacate what had been done in the state court previous to the removal. The circuit court, when a transfer is effected, takes the case in the condition it was when the state court was deprived of its jurisdiction. The circuit court has no more power over what was done before the removal than the state court would have had if the suit had remained there. It takes the case up where the state court left it off." In view of this authority, I am disposed to consider the question of the sufficiency of the verification of the bill as

disposed of by the action of the state court. No doubt this court may, upon proper showing, in a case removed, vacate or modify an injunction allowed in the case by the state court, and before removal; but such an order should not be made as the result of the consideration of any question of pleadings or practice decided by the state court before it was deprived of jurisdiction.

2. It is insisted that the injunction should be dissolved because there is no allegation that Heller, the plaintiff in the confessed judgment, is insolvent. It is said that, if he be solvent, the complainants herein have an adequate remedy at law in case he enforces his judgment, and thereby deprives them of the means of collecting their claims against Schwed & Newhouse. The complainants have a lien by attachment upon certain property, and they aver that, by means of a fraudulent judgment, the defendant Heller and Schwed & Newhouse have conspired together to take said property, thereby depriving complainants of the means of enforcing their lien. If these allegations be true, the complainants are entitled to the relief sought without alleging the insolvency of Heller. They have the right to hold their liens upon the property of their debtor, and to enforce the same as against any fraudulent claims or liens attempted to be set up by third parties, whether such third parties are solvent or insolvent. They are not bound to submit to the enforcement of a fraudulent and void judgment against said property, and the defeat thereby of their attachment liens upon it, even though such judgment may be held by a person who is able to respond in damages. The holder of a fraudulent and void judgment cannot be permitted to enforce it on the ground that he may be afterwards sued at law, and a judgment for damages recovered and enforced against him. If the judgment was obtained by collusion, and for the purpose of defrauding complainants, an injunction to restrain its execution is the proper remedy (High on Injunctions, § 118; *Green* v. *Haskell*, 5 R. I. 449; *Oakley* v. *Young*, 2 Halst. Ch. 453); and I am of the opinion that in such a case the bill need

not aver the insolvency of the plaintiff on the fraudulent judgment. To allow the execution of such a judgment as against innocent third parties, remitting them to their action for damages afterwards, would not be to afford them a plain, speedy and adequate remedy. The jurisdiction in equity arises in all such cases upon a proper allegation of fraud. If it were necessary to aver and prove insolvency as well as fraud, the jurisdiction would be defeated in very many cases.

3. It is insisted that this court cannot maintain the injunction because it stays proceedings in a state court. Section 720 of the Revised Statutes of the United States provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." The ready answer to this proposition is that the court is not asked to grant an injunction to stay proceedings upon the judgment in the state court, but only to continue in force an injunction allowed by the state court before the removal of the cause. Jurisdiction for this purpose is plainly given by the fourth section of the act of congress of March 3, 1875, which provides "that when any suit shall be removed from a state court to a circuit court of the United States, * * * all injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be so removed." If the removal act did not contain this provision, I think it would be implied from necessity. In all cases where a removal is authorized, the federal court must be empowered by necessary implication, if not by the express words of the statute, to take the case and carry it on to final judgment and execution. If this were not so, the effect of a removal might be to deprive a party of his remedy in the state court, and to give him none in the federal court.

The motion to dissolve the injunction is overruled.

NOTE.— See *Diggs* v. *Walcott*, 4 Cranch, 179.

ADLER, GOLDMAN & COMPANY *v.* ROTH, Defendant, and SHAPLEIGH & COMPANY, Intervenors.

(Eastern District of Arkansas. ———, 1881.)

1. ATTACHMENT — LEVY — PERSONAL PROPERTY.— To constitute and preserve an attachment of personal property capable of manual delivery, the officer must take the property into custody and continue in the actual possession of it, by himself, or by an agent appointed by him for that purpose.
2. SAME — TWO WRITS — PRIORITY.— Where writs of attachment issue from a federal and a state court against the same defendant, the one under which the property is first actually taken into custody has priority, without regard to the date of the respective writs, and a United States marshal and a sheriff cannot make a joint or partnership levy, nor can one of these officers make a levy subject to the prior levy of the other.

Caldwell Bradshaw, for intervenors.

Cohn & Cohn and *Ebin W. Kimball*, for Adler, Goldman & Co.

N. & J. Erb, for E. Roth.

CALDWELL, *District Judge.*— On the twenty-sixth of November, 1880, Adler, Goldman & Co. sued out of this court a writ of attachment against the property of E. Roth, and placed the same in the marshal's hands for service. On the same day Shapleigh & Co. sued out a like writ against the same defendant, before a justice of the peace, and placed it in the hands of a deputy sheriff for service. The plaintiffs in the last writ petition for an order requiring the marshal to release twelve wagons and eighteen barrels of salt from the levy of the writ in his hands, and turn the same over to the custody of the deputy sheriff, upon the ground that the latter officer executed the first attachment on the same. The petition is contested by the other attaching creditors and the defendant in the writs.

The writs of attachment in the hands of the marshal and deputy sheriff respectively have been introduced in evidence.

The returns on both writs show on their face a valid levy. From the face of the returns it appears the marshal levied on the property at 5 o'clock P. M., and that the deputy sheriff levied on the same property at 6:30 o'clock P. M. of the same day. Each officer testifies to the correctness of his return, and the deputy sheriff testifies that he made his levy nearly an hour before the arrival of the train which brought the deputy marshal to the town where the property was found. In the view taken of the case it is not necessary to determine which one of these officers is right in his recollection as to the time he cast a furtive glance after night on the property. It turns out that neither of them knew what constituted a valid levy of a writ of attachment on personal property, and neither of them made an effectual levy on the night in question, whether the property be regarded as capable of manual delivery or otherwise.

The deputy sheriff testifies that the property was on an uninclosed lot in the rear of the storehouse of the defendant in the attachment; that it was dark at the time he went where the property was found; that no one was in the storehouse or about the premises; that the storehouse was locked and the key in the possession of the deputy marshal, but not the deputy who afterwards levied the writ on the wagons and salt; that by the light of a burning match he ascertained the maker's name on the wagons and went away, and afterwards indorsed his return upon the writ. He did not take the property into his custody, or remove it, or put it in the custody of any one, or procure a receiptor for it. He did not even have the agreement of the debtor that it might remain where it was without interference. He did absolutely nothing but go to the place where the property was and look upon it by the light of a burning match, and then go away, leaving it in the open lot where he found it, and where it was afterwards found and levied upon by the marshal. The code provides that the officer shall execute the order of attachment "upon personal property, capable of manual delivery, by taking it into his

custody and holding it, subject to the order of the court. Upon other personal property by delivering a copy of the order, with a notice specifying the property attached, to the person holding the same." Section 399, Gantt's Dig.

These provisions only formulate the previously well settled rules of law on this subject. The "custody and holding" required in the case of property capable of manual delivery is actual and real, not ideal or constructive.

The officer's indorsement on the writ, that he has levied on the property and taken it into his custody, amounts to nothing if he has not in fact done so. He must obtain the power and control over it, and take it out of the power and control of the debtor. The object of a writ of attachment is to take the property out of the debtor's possession, and transfer it into the custody of the law, for the security of the plaintiff. *Hollister* v. *Goodale*, 8 Conn. 332.

The authorities are uniform that to constitute and preserve an attachment of personal property, capable of manual delivery, the officer must take the property into custody, and continue in the actual possession of it by himself or an agent appointed by him for that purpose. If to do this it is necessary to remove the property, then it must be removed. Where the debtor is divested of his possession and control, and the officer or his agent is in the actual custody of the property, it may remain in the place where it is found. But if a removal is necessary in order to retain possession, it is the duty of the officer to remove it; and the fact that the removal will be attended with some inconvenience does not furnish an excuse for a neglect to retain possession. *Chadburne* v. *Sumner*, 16 N. H. 129; *Miller* v. *Camp*, 14 Conn. 219; *Gower* v. *Stevens*, 19 Me. 92; *Lane* v. *Jackson*, 5 Mass. 157; *Gale* v. *Ward*, 14 Mass. 356; *Odiorne* v. *Colley*, 2 N. H. 66; *Huntington* v. *Blairdell*, id. 317; *Butterfield* v. *Clemence*, 10 Cush. 269; *Crowfor* v. *Newell*, 23 Iowa, 453.

The wagons and salt in question were capable of manual delivery. They were the property of the defendant in the

writs, on his premises, and in his possession. The deputy sheriff did nothing whatever to divest or change this possession, or prevent the attachment of the property by any other officer. In the first instance the levy made by the marshal was no better than that made by the deputy sheriff, but afterwards, and before the deputy sheriff had taken or attempted to take the actual custody of the property, the marshal perfected his levy by taking actual possession, and now has the property in his custody. It is needless to inquire whether the writ from this or the magistrate's court was first issued. The rule is well settled that in case of such writs issuing from a federal and state court against the same defendant, the writ under which the property is first actually taken into custody has priority, without regard to the date of the respective writs. The usual statutory provision that an execution or writ of attachment shall be a lien upon or bind the property of the defendant in the writ from the time it comes to the hands of the officer has no operation in such cases. In the case at bar neither the marshal nor the deputy sheriff had the least priority of right until one had acquired it by a prior valid levy. The possession under such a levy is notice of the attachment, and prevents a second attachment, and all conflict of jurisdiction. Nor can the marshal of this court and a sheriff make a joint or partnership levy on the same property, nor can one of these officers make a levy subject to the prior levy of the other. They act under authority of different governments, and each must make his return and account to the court of which he is an officer. Any effort to mingle their powers and authority would lead to confusion, and tend to bring about conflicts between the courts of the two governments and their officers. To avoid these results the rule is inflexible that property cannot be the subject of levy under writs issuing from a federal and state court at the same time. The first actual seizure, whether under the federal or state authority, withdraws the property from the reach of the process of the other. *Hagan* v. *Lewis*, 10 Pet. 400; *Brown* v. *Clark*, 4 How. 4; *Pul-*

liam v. *Osborne*, 17 How. 471; *Taylor* v. *Caryl*, 20 How. 583; *Fox* v. *Hempfield R. Co.* 2 Abb. U. S. 151; *Johnson* v. *Bishop*, 1 Woolw. 324; S. C. 8 Bank Reg. 533.

Petition dismissed.

DOUGLASS *v.* LINCOLN COUNTY, IN THE STATE OF MISSOURI.

(Eastern District of Missouri. December, 1880.)

1. MUNICIPAL BONDS — "ISSUED" — STATUTE OF MISSOURI. — Municipal bonds are not duly "issued," under the laws of Missouri, unless the same have been duly registered in the office of the state auditor.

Defendant requests the court to instruct the jury as follows: "The jury are instructed that the bonds from which coupons sued on are alleged to have been detached were not executed or issued by the defendant until the same were countersigned, before delivery, by an agent of Lincoln county. If, therefore, the jury find from the evidence that either of the bonds sued on was thus countersigned and delivered after March 30, 1872, by James M. McClellan, claiming to act as agent of Lincoln county under and by virtue of an order of the county court of said county, made May 16, 1872, the jury are instructed that as to such bonds, and as to any coupons from such bonds detached, plaintiff cannot recover unless the jury further find from the evidence that said bonds and coupons have been registered in the office of the state auditor of the state of Missouri."

John B. Henderson and *John H. Overall*, for plaintiff.

H. A. Cunningham, for defendant.

TREAT, *District Judge (orally).* — The question presented is very clear. It is as to the meaning of the term "issued," as found in the act of the general assembly of the state of Missouri, entitled "An act to provide for the registration of bonds issued by counties, cities and incorporated towns, and to limit

the issue thereof." Section 4 provides: "Before any bond hereafter issued by any county, city or incorporated town, for any purpose whatever, shall obtain validity or be negotiated, such bond shall first be presented to the auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the state bonds are now registered; and who shall certify, by indorsement on such bond, that all the conditions of the law have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor," etc. It seems from the evidence that the county court, on the twenty-first of June, 1870, ordered that these bonds be issued, and that the presiding judge of the county court and the clerk of the court signed the same, and that the seal of the county court was affixed thereto on said day, and that on the following day the bonds were placed in the hands of D. S. Waddy, as agent of Lincoln county; that afterwards, on the sixteenth of May, 1872, said Waddy resigned, and surrendered into the custody of the court all bonds numbered above a certain number; that on said day the court appointed James M. McClellan agent of Lincoln county, and that the bonds above said number are countersigned only by said James M. McClellan as agent of Lincoln county. Upon the face of each of these bonds it is declared that "this bond shall be countersigned by the agent of said county before the delivery thereof." I cannot hold that these bonds were properly executed or issued by Lincoln county before the same were countersigned and delivered or negotiated by the agent of Lincoln county, as required upon the face of each of said bonds. Until these acts were duly performed by a duly authorized agent of Lincoln county, the bonds were neither executed nor issued, within the meaning of the aforesaid registration act, and I shall therefore give the instruction asked by defendant.

To which ruling of the court plaintiff's counsel excepted.

LONERGAN *v.* MISSISSIPPI RIVER BRIDGE COMPANY.

(Eastern District of Missouri. February, 1881.)

1. ERECTION OF DIKE IN MISSISSIPPI RIVER — OVERFLOWING LANDS — INJURING FERRY FRANCHISE. — Suit to recover damages for injuries alleged to have been done to certain lands, and to a certain ferry franchise, by reason of the construction of a certain dike in the Mississippi river by the defendant. *Held*, (1) that plaintiff had, under the laws of Illinois, and according to the evidence, no title to the lands, for injury to which the suit was brought; (2) that the act of the general assembly of Illinois granting a charter for a ferry across the Mississippi river, under which the plaintiff claims, did not give the grantee any right to control the channel of the river, or to prevent its improvement without compensation to him by the United States. *Mississippi River Bridge Co.* v. *Lonergan*, 91 Ill. 508, followed.

D. P. Dyer, for plaintiff.

R. H. Kern, for defendant.

MCCRARY, *Circuit Judge (orally).*—The plaintiff sues the defendant to recover damages for injury alleged to have been done to certain lands and to a certain ferry franchise by reason of the construction of a certain dike in the Mississippi river by defendant. By an act of congress approved March 3, 1871, the erection of a railway bridge across the Mississippi river at Louisiana, Missouri, was authorized, which bridge was to be built under and according to such regulations for the security of the navigation of the river as the secretary of war should prescribe. 16 Stat. at Large, 473. The secretary of war, in pursuance of the recommendation of a board of engineers, required the erection of the dike in question for the better improvement of the navigation of the river. The bridge connected two great thoroughfares by rail, terminating on the opposite banks of the river.

The plaintiff alleges that the consequence of the erection of the dike was to injure lands belonging to him adjoining the river, and also to impair the value of his ferry franchise, under

which he was authorized to run a ferry across the Mississippi river at Louisiana. The question is, can he recover?

This identical controversy has been before the courts of Illinois, and the supreme court of that state, in an elaborate opinion, has decided every material question in the case adversely to the plaintiff. *Mississippi River Bridge Co.* v. *Lonergan*, 91 Ill. 508. In that case it was held — *First*, that Lonergan had under the laws of Illinois, and according to the evidence (which was the same as now offered), no title to the lands, for injury to which the suit was brought; *second*, that the act of the general assembly of Illinois, granting a charter for a ferry across the Mississippi river, under which act the plaintiff claims, did not give the grantee any right to control the channel of the river, or to prevent its improvement without compensation to him by the United States.

The court said: "The act of the legislature of this state, which established the ferry, gave the plaintiff no right or interest whatever in the flow of the river." Upon these propositions, which are conclusive of the case, I am inclined to the opinion that this court is bound to follow, as a rule of decision, the ruling of the supreme court of Illinois.

The first point decided should, perhaps, be accepted by this court as a rule of property established by a deliberate decision of the supreme court of that state. *Henderson* v. *Griffin*, 5 Pet. 151.

The second point comes within the description of a judicial interpretation by the highest court in the state of one of its own statutes, and is therefore binding upon the federal courts.

But it is not material in this case to decide that this court is bound by the ruling of the supreme court of Illinois, for I have examined with care the opinion of that court above cited, and have considered fully the argument of plaintiff's counsel in opposition to the views therein expressed, and my conclusion is that the decision is sound and should be followed upon the merits of the questions discussed.

Judgment for defendant.

KELLY and others *v.* DEMING and others.

(Eastern District of Missouri. January, 1881.)

1. ATTACHMENT — PROPERTY IN POSSESSION OF CARRIER — VENDOR AND VENDEE.— Certain property, to be paid for in cash on delivery, was attached by the vendee's creditors while still in the possession of the carrier. *Held*, that such creditors could acquire no right in the property, or to the possession thereof, as against the vendor, without, at least, payment of the price and charges.

Trial without the intervention of a jury.

Chester H. Krum, for plaintiffs.

Stewart & Bakewell, for defendants.

TREAT, *District Judge.*— One Warriner, through false and fraudulent representations, caused plaintiffs to ship to him the property in question, payable in cash on delivery. The property was shipped by rail, and said Warriner having in the meantime absconded, was placed in the railway's storehouse, subject to order, etc. Thereupon creditors of Warriner caused the same to be seized by attachment, and the plaintiffs caused the same to be replevied out of the possession of said attaching creditors and the officer who at their instance had seized the same. Warriner never paid for said property, or claimed the same, while in the custody of the railway company. As stated at the trial, where property acquired by fraud has passed to innocent purchasers from the vendee for value, after delivery to the vendee, the vendor cannot as between himself and said purchasers reclaim the same. Yet the right of stoppage in transit cannot be defeated by such sale before delivery. The cases cited turn mainly on the question of actual or constructive delivery, the *bona fides*, and where given by the alleged purchaser.

The dispute as to a valuable consideration is a very old one, and pertains not to the purchase of goods alone, but to the transfer of commercial paper. As to the latter class of cases, the

most noted are those in New York. The case before the court does not call for any inquiry as to the nature of a valuable consideration when the same is for an antecedent debt, and the transferor makes the transfer for such consideration alone. Here the vendor made no transfer. He had not even received possession of the property. It was still in possession of the carrier, subject to stoppage *in transitu*. The shipment was made for cash on delivery. The attaching creditors were subordinate in right to the shipper, and therefore the plaintiffs' replevy must hold.

The property in question had never passed into the actual custody of Warriner, and he had never complied with the terms of shipment or purchase. His attaching creditors had never purchased this property from him, nor parted with value therefor, nor dealt with him on the faith of his ownership thereof. Indeed, he never became the owner of the property, for he never complied with the terms of the conditional sale nor exercised any right of possession. But it is contended that there was a right of possession vested in the vendee which passed to the attaching creditors, viz., a right on payment of the sale price and charges of transportation to the possession of the property; and consequently that the plaintiff, on taking the property by replevy, ought to respond to the attaching creditors for the difference in the price at which the property was sold, with costs of transportation added, and the actual value of the property at the date of the replevy. The vendee had a right, on payment of the cash price and charges, to receive the property and thus become the absolute owner thereof, or to take possession as consignee. He never paid the price or charges, never received the property, and never claimed the same. It had been shipped to him on the terms stated, and by no act of his had plaintiff's rights been defeated. What legal complications might have arisen, if he had taken possession from the carrier, it is not necessary to discuss. No such possession was ever obtained or claimed by, nor was any sale made by him in transit, and the property was still in posses-

sion of the carrier. How then could his attaching creditors acquire as against the vendor any right in the property, or to the possession thereof, at least without payment of the price and charges? If they had any such right on such payment made, can they, without such payment or tender, hold the vendor to an ascertainment of the value of the property replevied, with charges added, and to answer over to them for the balance? Until the vendee had an acquired right in the property, irrespective of the vendor, his creditors could not defeat the vendor's demand, nor make the vendor who had reclaimed his own property responsible to them for any supposed or actual accessions in value intermediate the shipment and replevy. This case is here free from all questions as to an assignment of a bill of lading or bill drawn against the shipment.

As no special damages for detention by defendants have been proved, the court orders judgment for the plaintiff for nominal damages and costs.

Osborn *v.* Osborn and others.

(District of Minnesota. December, 1880.)

1. Removal — Local Prejudice Act — Final Hearing in State Court. The submission of a case to a jury does not constitute a "final hearing," within the meaning of the "local prejudice act," when there has been a partial disagreement as to the verdict.
2. Chancery Case — Verdict of Jury — Minnesota Statute. — Under the peculiar provisions of the statute of Minnesota, the submission of the facts of a chancery case to a jury render the verdict a necessary part of the final trial of the cause.

Motion to remand.

Gordon E. Cole, for plaintiff.

C. M. Start and *Taylor & Sperry*, for defendants.

McCrary, *Circuit Judge (orally).*— This is a motion to remand. The case is equitable in its character, and was commenced in the state court under the practice authorized by the laws of Minnesota. Certain issues of fact, some five in number, I believe, were submitted to a jury. The evidence was heard, the case submitted, and the jury failed to agree. They agreed upon two of the questions submitted to them, but failed to agree as to three. The cause is removed under what is known as the "local prejudice act," which provides that, upon making the required affidavit, the case may be removed "at any time before the final hearing or trial." The only question in this case is as to whether there was a final hearing. The cause went so far that the court received the evidence and submitted to the jury the questions of fact which had been framed for their consideration; but as to the most material of these questions the jury failed to agree. There was in effect no verdict. It is as if there had been an entire failure to find any verdict, because a partial verdict in such a case is no verdict at all. If a trial by jury under the statutes of Minnesota, in a case of this character, is a part of the trial of the case, there has been no final trial within the meaning of the statute. Of course, it is well known that under the old practice a jury in a chancery case was only called for the purpose of aiding the conscience of the chancellor by settling certain facts in dispute. But, under the peculiar provisions of the statute of Minnesota, we are of opinion that where the court determines, either upon its own motion or by consent of parties, to submit the facts in a chancery case to a jury, then the verdict of the jury becomes a necessary part of the final trial of the case; and, as there was no verdict, we hold there was no final trial of the case, and therefore the motion to remand is overruled.

PAIGE *v.* SMITH.

(District of Minnesota. January, 1881.)

1. SHERIFF'S CERTIFICATE — REDEMPTION FROM MORTGAGE FORECLOSURE — WHEN NOT CONCLUSIVE — STATUTES OF MINNESOTA.— A sheriff's certificate of redemption from a mortgage foreclosure sale is not so far conclusive under the statutes of Minnesota as to prevent the redemptioner from showing that he paid the full amount of the redemption money within the time fixed by the statute for the making of a valid redemption.

Gilman & Clough, for plaintiff.

Benton & Benton and *Lochren, McNair & Gilfillan*, for defendant.

NELSON, *District Judge.*— This is an action of ejectment, tried without a jury. The defendant has paid the costs of the first trial, which resulted in a judgment against him, and the case is tried again as is allowed in such case by the statute of Minnesota. The plaintiff claims title as grantee of "Marcy," who held a mortage given by Cummins & Rouse on the undivided three-fourths of the land in dispute. This mortgage was foreclosed and the property sold October 30, 1875, and purchased by Marcy, the mortgagee, to whom a certificate was given by the sheriff, which was assigned March 8, 1876, to the plaintiff and L. L. Hubert, copartners.

The defendant claims through numerous conveyances and assignments from Cummins, the co-tenant of Rouse and his successors in interest, by virtue of an alleged redemption from the foreclosure sale under the Marcy mortgage, and also through conveyances and assignments under a sale of the property to satisfy mechanics' liens. If Cummins redeemed from the sale under the Marcy mortgage in time, the defendant is entitled to judgment. On the first trial the evidence showed that Cummins, before the time for redemption expired, tendered to the sheriff a portion only of the bid made by the purchaser, and received a certificate of redemption of a certain part of the property, and, on the day after the time

for redemption expired, he received a certificate of redemption for the remaining portion of the property sold on payment of the balance of the bid.

The decision on the first trial upon this state of facts was controlled by the following propositions:

First. The redemption must be made by payment of the sum for which the property was sold. The whole debt must be paid, and the redemptioner then stands in the place of the party whose interest in the property he discharges.

Second. A co-tenant of an equity of redemption has no right to compel a mortgagee, or a purchaser of the property at the sale, whose rights are the same as the mortgagee, to release such part of the mortgage title as is proportionate to his share in the equity of redemption on being paid a corresponding part of the mortgage debt. The mortgagee is not obliged to accept payment of anything less than the whole debt, nor is the purchaser at the foreclosure sale obliged to accept less than the whole of the purchase money and become a co-tenant in the property with a redemptioner.

On the second trial the defendant proved that the whole amount of the bid at the foreclosure sale was paid the sheriff previous to the day when the time for redemption expired, and that a certificate of redemption covering the whole property was executed and delivered by the sheriff to Cummins, and that there was a single payment for the entire redemption at that time. This certificate, the evidence shows, was subsequently returned to the sheriff, and other certificates of different dates, covering distinct portions of the mortgaged property, were given, on account of the difficulties in the mind of the agent who acted in behalf of Cummins. This person was only anxious to make a legal and sufficient redemption, but was perplexed as to the proper form of making the certificates, and in doubt whether, Cummins being a lienholder by virtue of a mortgage taken by him on the sale of the property subsequent to the date of his mortgage to Marcy, there should not be separate certificates. The fact is proved, however, that

the sheriff received the whole amount of the purchaser's bid for redemption within the time provided by the statute, and by this payment Cummins made a valid redemption. It is urged by the plaintiff's counsel that this evidence contradicts the sheriff's certificates and is inadmissible.

I cannot agree to the proposition that these certificates are conclusive upon the party who made the redemption. The question to be determined is, did Cummins pay for the purpose of redeeming from the Marcy foreclosure sale the full amount necessary, and within the time fixed by the statute to make a valid redemption? I think the evidence proves he did pay the whole amount of the bid two days before the year expired, and complied with the statute, which entitled him to the property released from any claim of the purchaser.

The statute giving the redemption should be liberally construed, and when the money is paid in good faith the person redeeming should be protected, although the sheriff's certificate may recite a different state of facts.

Judgment will be entered in favor of the defendant, and it is so ordered.

Blair *v.* West Point Precinct.

(District of Nebraska. January, 1881.)

1. Precinct Bonds — Liability of Precinct — Statute of Nebraska. A statute of the state of Nebraska provided, *inter alia*, that "any precinct, in any organized county in this state, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act, and in such case the [county] commissioners shall issue special bonds for such precinct, and a tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds." *Held*, that a precinct issuing bonds under the terms of this statute was not thereby impliedly created a body corporate in order to insure the collection of the coupons attached to such bonds. *Jordan* v. *Cass County*, 3 Dillon, 185.

2. SAME — NOTICE — REFERENCE TO STATUTE.— *Held, further*, that the mere fact that the bonds did not show upon their face that they were issued on behalf of the precinct was immaterial, when such fact appeared in the statute referred to upon the face of the bonds.
3. SAME — LIABILITY OF COUNTY — STATUTE OF NEBRASKA.— *Held, further*, that such bonds, when issued by the proper officers of the county, were, in legal effect, bonds of the county, although voted by the inhabitants of the precinct, and to be paid by a tax to be levied upon the property within the precinct.
4. SAME — COLLECTION OF COUPONS — MANDAMUS.— *Held, further*, in an action on the coupons attached to such bonds, that suit should be brought against the county, and that the judgment, when recovered, should be enforced by *mandamus* against the officers of the county, commanding them to levy and collect upon the property within the bounds of the precinct the sum required for the payment of the judgment.

On demurrer to amended petition.

This suit is brought upon coupons attached to certain bonds executed by the board of county commissioners of the county of Cumming on behalf of the West Point precinct, for the purpose, it is alleged, "of aiding the West Point Manufacturing Company in improving the water-power in the Elkhorn river for the purpose of propelling public grist-mills, and other works of internal improvements of a public nature in said West Point precinct."

The statute under which the subscription was made, in so far as it is necessary to be quoted, is as follows:

"That any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners for such county or city, not exceeding ten per cent. of the assessed valuation of all taxable property in said county or city; *provided*, the county commissioners or city council shall first submit the question of the issue of such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter 9 of the Revised Statutes of the state of Nebraska for submitting to the people of a county the question of borrowing money. * * *

"Any precinct, in any organized county in this state, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act, and in such case the commissioners shall issue special bonds for such precinct, and a tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds."

The plaintiff sues as bearer and owner of the bonds in question, and avers that he is *bona fide* purchaser of the same before maturity.

E. C. & W. C. Larned and *J. C. Crawford*, for plaintiff.

U. Bruner, for defendant.

McCrary, *Circuit Judge.*— Upon the consideration of the demurrer to the amended petition, the following questions have been discussed by counsel: *First*, whether West Point precinct, of the county of Cumming, state of Nebraska, is a corporate body and citizen of Nebraska capable of being sued in this court; *second*, whether, under the act of the general assembly of Nebraska of February 15, 1869, the material portion of which is set out in the foregoing statement, said precinct of West Point had power to issue the bonds sued on to aid in improving the water-power in the Elkhorn river for the purpose of propelling grist-mills and other works of internal improvement in the said West Point precinct."

In the view we have taken of the case it is only necessary to consider the first of the above questions. West Point precinct is not a corporation, and possesses none of the functions of a body corporate, except such as are conferred upon it by the provisions of the act under which the bonds sued on were issued. It is simply a subdivision of the county for election purposes. It has no officers and no organization. It would

be impossible to make legal service of process upon it. A judgment against it could not be enforced by execution or by *mandamus*, unless by the latter proceeding it might be reached through the officers of the county. The principle of law upon which the plaintiff in this case relies is undoubtedly sound, but it is not applicable. This principle is thus stated in 1 Dillon on Municipal Corporations, § 22: "If powers and privileges are conferred upon a body of men, or upon the residents or inhabitants of a town or district, and if these cannot be exercised and enjoyed, and if the purposes intended cannot be carried into effect without their acting in a corporate capacity, *a corporation is to this extent created by implication.*"

And in discussing a case quite analogous to the case at bar, that of *Jordan* v. *Cass County*, 3 Dillon, 185, the same judge said: "Undoubtedly the legislature designed that there should be a remedy upon these bonds, and if it were consistent with the legislative intent the court would be justified in holding, if necessary to afford an effectual remedy, that the township was created by implication, as to this particular matter, *a body corporate, and as such liable to be sued.*" This doctrine is supported by the following authorities: *Russell* v. *Devon*, 2 Term. Rep. 672; *Levy Court* v. *Coroner*, 2 Wall. 501; *Inhabitants* v. *Wood*, 13 Mass. 192; *Bradley* v. *Case*, 3 Scam. 608; *North Hempstead* v. *Hempstead*, 2 Wend. 109; *Bessey* v. *Unity Plantation*, 65 Me. 347; *Freeholders of Sussex* v. *Strader*, 3 Harr. (N. J.) 117; *Cumberland* v. *Armstrong*, 3 Devereux, 284; *Dean* v. *Davis*, 51 Cal. 406; *Gaskell* v. *Dudley*, 6 Met. 552; *Hunneman* v. *Fire District*, 37 Vt. 40, where a fire district, authorized to purchase an engine, was held to be a corporation; Angell & Ames on Corporations, §§ 77–79; *Commissioner of Roads* v. *McPherson*, 1 Spear (S. C.), 218; *Governor* v. *Allen*, 8 Humph. 176.

An examination of these authorities will show that it is only in cases where a *bona fide* contract cannot be otherwise enforced, that courts will hold that a corporation has been created by implication. If the plaintiff could have no remedy

whatever upon the bonds in suit, except by an action against the precinct, it would no doubt be held that he was entitled to that remedy. But we are clearly of the opinion that under the law by virtue of which the bonds were issued, and assuming that they are valid obligations, the plaintiff has a right of action against the county of Cumming, within the principles of the decision in *Jordan* v. *Cass County*, *supra*. An examination of that case will show that the statute under which the township bonds therein considered were issued was substantially like the one now under consideration. It provided that "it shall be the duty of the county court to make such subscription *in behalf of such township*." The statute of Kansas, under which plaintiff's bonds were issued, provided: "And the county commissioners shall issue special bonds *for such precinct*, and a tax to pay the same shall be levied upon the property within the bounds of such precinct." It is true that in the case of *Jordan* v. *Cass County* there was a statement on the face of the bonds that they were issued by the county court on behalf of the township. No such statement appears upon the face of the bonds in the present case, but this makes no difference, because that provision appears in the statute which is referred to upon the face of the bonds, and is to be considered as if made a part thereof.

The bonds, then, although voted by the inhabitants of the precinct, and to be paid by tax levied upon the property within the precinct, are issued by the proper officers of the county, and are, in legal effect, bonds of the county. The plaintiff's remedy is by suit against the county; his judgment, when recovered, is to be enforced by *mandamus* against the officers of the county, commanding them to levy and collect upon the property within the bounds of the precinct the sum required for the payment of the judgment.

Upon this ground the demurrer to the amended petition must be sustained.

DUNDY, *District Judge*, concurs.

LEWIS *v.* BOARD OF COUNTY COMMISSIONERS OF SHERMAN COUNTY.

(District of Nebraska. January, 1881.)

1. COUNTY COURT-HOUSE BONDS — WHEN INVALID — STATUTE OF NEBRASKA.— Certain county court-house bonds, issued by a county in the state of Nebraska, *held invalid:* (1) because there was no statutory authority to vote for such bonds; (2) because no bonds had ever been voted by the county for any such purpose; (3) because none of such bonds, or the proceeds thereof, were ever used to build a court-house, or were ever used for any other purpose by the county; (4) and because such bonds contained no recitals showing that the same had been issued conformably to law.
2. STATUTE — POWER TO "BORROW MONEY" — POWER TO ISSUE BONDS.— A law authorizing the electors of a county to empower the commissioners of a county to "*borrow money*" for the erection of a court-house, does not authorize them to empower such commissioners to *issue bonds* for that purpose.
3. SAME — SAME — SAME.— The authority to issue bonds as an evidence of indebtedness might perhaps follow as an incident of the right to borrow money, but in that case the amount of money borrowed should equal the amount for which the bonds call.
4. COUNTY BRIDGE BONDS — WHEN VALID — NEBRASKA.—Certain county bridge bonds, issued by a county in the state of Nebraska, reciting that they were issued conformably to law, *held valid* in the hands of an innocent purchaser for value, in open market, when the bridges were built in the county, by direction of the county, for the county, and were paid for by such bonds or their proceeds, although such bonds were not in fact authorized by a vote of the people, as the law required.

Findings of the court, jury trial having been waived in writing.

It is found from the pleadings and the testimony produced in support thereof: That the bonds described in the plaintiff's petition as court-house bonds, from which a part of the coupons in suit were detached, are invalid, for the reason that no vote of the people ever authorized their issue, and for the further reason that the county never realized anything thereon, and no part of any proceeds of the same was ever used for or applied to the erection of a court-house, and that there is no recital in the bond, so called, showing that the bonds were properly is-

sued, so as to estop the defendant from insisting on their invalidity. *Second.* That the bonds described in plaintiff's petition as bridge bonds, from which the other coupons in suit were detached, were issued without having been authorized by a vote of the people. But the bridges were built in the county, by direction of the county, for the county, and were paid for by the bonds or from proceeds thereof, and the recitals in the bonds showing that they were issued conformably to law estops the defendant from setting up the defense relied on, as the plaintiff was an innocent purchaser for value, etc.; that the bridge bonds were issued and put in circulation, and were found for sale in open market by the plaintiff.

Alfred Ennis, for plaintiff.

T. M. Marquett, for defendant.

DUNDY, *District Judge.*— This suit is based on a large number of coupons, long overdue, detached from two series of bonds issued by Sherman county, or at least by officers representing the county, one of which series of bonds was issued for the purpose of building a court-house, and the other series for the purpose of building bridges in the county. The defense to the bonds is that they were never voted for by the people of the county; that they were never issued by the county; and that neither the court-house bonds nor the proceeds thereof were ever applied in any manner to the erection of a court-house.

It is made to appear from the minutes of the county commissioners that the court-house bonds were issued and placed in the hands of a banker at Kearney, probably for the purpose of being negotiated. But sometime thereafter the bonds were recalled by the county board, for what particular purpose does not appear. At what time or in what manner or for what particular purpose these bonds were afterwards turned loose on the market is not shown; nor does it make any particular difference in that regard.

It may be conceded, as a general proposition, that a "court-house" is a work of internal improvement; but it may very well be questioned whether our internal improvement law of the fifteenth of February, 1869, has any application to such a work of internal improvement. As early as the year 1856, the territorial legislature provided for the building of court-houses and jails, and made ample provision therefor. The same law has been in force almost ever since, and, with few slight changes, is the law to-day. When the internal improvement law of 1869 was passed, it was well enough understood that it was passed for the express purpose of enabling counties, cities and towns to vote aid to railroads and bridges and works of a kindred character. No one supposed it to be necessary to pass such a law to enable a county to build a court-house. Ample provision had already been made by law therefor. On the twenty-seventh of February, 1873, before these bonds were issued, the legislature re-enacted the old law, with slight changes, which authorized the building of court-houses, and it is believed to be the only general law which authorizes the expenditure of money for any such purpose. This law indicates pretty clearly the mode of proceeding when it is necessary or desirable to build a court-house.

Section 14, p. 234, Gen. St. of Nebraska, has this provision: "The board of county commissioners, at any meeting, shall have power * * * (3) to purchase sites for and to build and keep in repair county buildings; * * * (4) apportion and order, the levying of taxes as provided by law, and to borrow upon the credit of the county a sum sufficient for the erection of county buildings. * * *" "Section 15. The board of county commissioners shall not * * * borrow money for the purpose specified in the fourth subdivision of the preceding section without first having submitted the question * * * of borrowing money as aforesaid to a vote of the electors of the county." Other provisions of the law perfect the details of the business to be transacted by the commissioners in connection with the voting and borrowing money.

It will be seen from the foregoing that before the commissioners can lawfully borrow money for the purpose of building a court-house, the right and authority to do so must be conferred by a vote of the electors of the county. This is indispensable, as no right for such purpose exists without it. It must be observed that the authority *here* conferred on the county commissioners is to *borrow money* to build a court-house. The law does not authorize the people to vote *bonds* to erect the building. They may, by their votes, lawfully empower the commissioners to *borrow money* for the purpose in question, but they cannot authorize the commissioners to issue bonds for such a purpose, and have them hawked around the country and sold to A., B. and C. to raise money at a ruinous discount for any such a purpose.

It is *one* thing to authorize the borrowing of money to build a court-house when needed, but it is *another* and very *different* thing to vote for the issuing of bonds therefor, when the law does not authorize it. It is true, if the people by a proper vote should authorize the commissioners to borrow money, that on receiving the money a bond or other evidence of indebtedness might be given for the payment of the money when due under the terms of the loan. This would perhaps follow as an incident to the right to borrow. But even then the amount of money so borrowed should equal the amount for which the bond was given, otherwise there would be no end to the fraudulent practices of both officers and purchasers of bonds. Such a practice cannot be encouraged, and it is the duty of courts to close the doors against it. If, then, the law does not authorize the voting of bonds for any such a purpose as building a court-house, then the authority to borrow money cannot be enlarged by the commissioners or the people so as to include the right to issue bonds and sell them at such price as can be procured therefor, when such authority has been withheld by the law-making power. This view is fully supported by a case recently decided by the supreme court (*Scipio v. Wright*, 101 U. S. 665).

So far as the court-house bonds are concerned, then, they must be held invalid, for the reasons: *First*, want of authority for voting bonds for the purpose of building a court-house; *second*, because no bonds were ever voted by Sherman county for any such purpose; *third*, because none of the bonds or the proceeds thereof were ever used to build a court-house, or were ever used for any purpose by the county; and *fourth*, because the bond contains no recitals showing that the same had been issued conformably to law, so as to cut off the defenses relied on.

But with reference to the coupons taken from the bridge bonds it is different. There is full authority of law for the people of a county to vote for the issuing of bonds to aid in building bridges. The bridge bonds recite on their face that their issue was duly authorized by a vote of the people of the county, and that the result of such election was entered upon the commissioners' records, as provided by law. This recital is perhaps untrue, as the commissioners' proceedings show no such thing. But, as stated, the law authorizes the voting of bonds for such a purpose, and the bond recites the fact that they were properly voted for and authorized by a vote of the people of the county on the eleventh day of August, 1873, and that the result of the vote was spread upon the commissioners' journal of proceedings. The purchaser of the bonds, without notice of infirmity, was not in a position to know or believe that the bonds recited a falsehood on their face, and he was not, under the circumstances, bound to look beyond the bond itself. He might well believe what he saw stated in the bond. Fair dealing will not permit the defendant to gainsay what it has, through its proper officers, thus solemnly asserted. But this is not all. The law not only authorizes the issuing of bonds for such purposes, but they were so issued, and used directly in payment for building several bridges in the county, the principal one being across the Loup river. The county has had the full benefit of the bridge bonds. They were turned over directly to the parties who built the bridges, and were by them put on the market and into circulation, with the state-

ment on their face that they had been properly voted for and issued. Good faith and common honesty require their payment when found in the hands of innocent *bona fide* purchasers. The plaintiff must therefore have judgment on the coupons detached from the bridge bonds, with lawful interest thereon from the time the same became due and payable.

BROWN *v.* BOARD OF COUNTY COMMISSIONERS OF SHERMAN COUNTY.

(District of Nebraska. January, 1881.)

1. COUNTY WARRANTS — WHEN VOID — STATUTE OF NEBRASKA. — County warrants, issued for the purpose of erecting a county court-house in the state of Nebraska, are void, where their issue was not authorized by a vote of the qualified electors of the county, and no benefit whatever resulted to the county from the issuing of the said warrants.

Jury trial waived. Finding of facts.

It is found from the pleadings and the testimony produced in support thereof that the county orders in suit were issued by the county commissioners of Sherman county in part payment of the contract price for building a court-house for the county; that the building of a court-house involved the extraordinary expenditure of money, and that no vote of the qualified electors of the county ever authorized the expenditure of money or the issuing of the orders for any such purpose; that no court-house was built and accepted by the county, and no benefit whatever resulted to the county from the issuing of said warrants; that the warrants are not negotiable securities, and are void for want of proper authority to issue them.

C. S. Case and *J. C. Cowin*, for plaintiff.

Groff & Switzer, for defendant.

DUNDY, *District Judge.*— Suit is brought on ordinary county orders, or warrants drawn on the county treasurer, to the

amount of $3,000. The orders were drawn on the ninth day of July, 1874, and were presented to the county treasurer and payment thereof demanded, and indorsed not paid for want of funds, on the eleventh day of July, 1874. Judgment is demanded for $3,000, with interest at ten per cent. per annum from July 11, 1874.

The building of a court-house usually involves the necessity for an extraordinary outlay of money, and the necessity of resorting to an extraordinary remedy to raise money and supply the funds to pay therefor. The ordinary county revenue is usually insufficient, even if available, therefor. And when it becomes necessary to build a court-house for the convenience of a county, there is a well-known method provided by law for raising the funds and authorizing the work to be done. Sections 14, 15, 16, 17, 18, 19, 20, 21, 22, ch. 13, pp. 234, 235, 236, Gen. St. of Nebraska, fully explain the *modus operandi*. A county cannot well build a $10,000 court-house with an empty treasury and bankrupt in credit to commence with. When it is undertaken disaster usually overtakes the enterprise, as it did in this instance. Now, I must hold that, when a county desires to built a court-house, if it has not on hands a sufficient fund which can be applied in payment for such a purpose without doing violence to principle, it must first submit a proposition to the qualified voters of the county, to get permission to incur such extraordinary indebtedness, and for authority to resort to the extraordinary remedy provided for raising the necessary and appropriate funds therefor. This was not done. Without such authority the commissioners could not lawfully contract for the erection of such a building, and without such action on the part of the electors of the county the commissioners were powerless to proceed, however much the building may have been needed. As authority for make such an appropriation of money was wanting, there was no rightful authority for issuing the warrants sued on. As both acts were wanting in lawful authority to uphold them, it follows that the warrants were void, and that no recovery can

be had on them. This same question has been more fully considered in another case just disposed of, in which Lewis is plaintiff and Sherman county is defendant. That case involved the validity of $5,000 in bonds issued to build a court-house for defendant, and what is said in that case relative to the court-house bonds applies as well to the warrants here under consideration.

Judgment for defendant for costs of suit.

HUTCHINSON and others *v.* GREEN and others.

(Eastern District of Missouri. April, 1881.)

1. INJUNCTION — INTERFERENCE WITH CONTROL OF PROPERTY IN POSSESSION OF STATE COURT. — No injunction will be granted by a United States court to interfere with the possession, control or disposition of property which is in the hands of a state court of co-ordinate jurisdiction.
2. RECEIVER — POSSESSION OF STATE COURT. — The possession of a receiver appointed by a state court, and acting under its orders, is the possession of the court itself, and the disposition of the property by the receiver is a matter to be ordered by the state court, and will not be interfered with by a United States court by injunction.
3. SAME — FRAUDULENT ASSIGNMENT — INJUNCTION. — Where a state court has appointed a receiver of the property of a corporation, and a fraudulent assignment has been subsequently made of the same, a United States court will not enjoin the assignee from receiving such corporate property from the receiver, in case the state court having control thereof orders it to be turned over to him.

In equity.

E. T. Allen and *J. O. Broadhead*, for plaintiffs.

James Taussig and *I. A. Madill*, for defendants.

TREAT, *District Judge.* — The plaintiffs, citizens of Iowa, bring this suit in behalf of themselves and other stockholders who may join against the defendant corporation, of which they are stockholders, and the assignee of said corporation. The

purpose of the suit is to have the assignment made by the corporation, through its then corporate authorities, under the facts and circumstances alleged, adjudged void; and in addition thereto it is prayed that a receiver may be appointed and an injunction against the assignee granted. The present motion is for a provisional injunction against the assignee. It appears that a petition pursuant to the statutes of Missouri was filed in the state circuit court for the removal of certain directors and the president of the defendant corporation, and such proceeding was thereupon had that said removals were decreed, and a special election ordered to fill the vacancies thus created in the board of directors. At the same time said court appointed a receiver of the corporate property and effects. The election, as ordered, was held and confirmed by the court, and a meeting, on due notice of the board as thus constituted, was held December 13, 1880, at which a new president was chosen, etc. Notice was duly given thereafter for the annual meeting to be held on January 19, 1881.

It is averred that for fraudulent purposes a meeting of the board was held, and, by a vote of the majority against the protest of the minority, and against the wishes of a majority of the stockholders, an assignment of the corporate effects, etc., was made, January 15, 1881 — four days before the annual meeting. The assignee has given bond under the state statute, and has proceeded, and is now proceeding, to execute the duties imposed upon him by law, subject to the supervision of the state court.

At the annual meeting, January 19, 1881, an election of directors was had, a new president chosen, said assignment repudiated, etc., and the new board instructed to protect the interests of the corporation in such manner as might be deemed advisable.

It is averred that, on investigation made, said corporation has been found solvent, and able, by the administration of its own affairs, not only to meet its obligations, but have a large surplus. The new board authorized and requested its presi-

dent to proceed in the state court to have the receiver turn over to the corporation its property in his hands on payment of expenses, etc., whereupon the president did so proceed, his petition therefor being accompanied by the written consent of ninety-six per cent. of the creditors. Said petition was opposed by the assignee and denied by the court.

It is alleged that pursuant to the vote of the stockholders the president had demanded of the assignee that he should reconvey the property to the corporation; that said assignee refused so to do; and that on March 25, 1881, the plaintiffs demanded of said president that "said corporation should at once institute the proper proceedings to enjoin" said assignee from "in any manner interfering with the property and assets of said corporation under said deed of assignment, and to set aside and cancel said deed of assignment, and that thereupon said Lowery [the president] refused to take further steps," etc.

These latter averments are evidently designed to bring the case within recognized rules as to suits by stockholders when the proper corporate authorities refuse to act in the name of the corporation or permit the name of the corporation to be used as party litigant. Although the averment may be subject to criticism as to its sufficiency, yet as it might be amended, possibly, consistent with facts justifying this form of action, it is thought, for present purposes, advisable to treat the averments as if fully complying with the equity rule.

The allegations of the bill have been thus summarized in order that it may appear with sufficient clearness what the demand is, why the jurisdiction of this court is invoked, and what is the condition of the record in the state court. The bill proceeds as follows: "And your orators, further complaining, say [etc.] that said St. Louis circuit court, in due course of procedure under the provisions of the statutes of the state of Missouri in that behalf, *is about to discharge the said Clubb as receiver of the assets of said corporation defendant, and direct said receiver to turn over said property to*

the party entitled to receive the same; and that said Charles Green, defendant herein, claims the right and proposes to receive said property from said receiver, and to sell and dispose of the same under said deed of assignment." The bill then states that irreparable mischief to the plaintiffs may follow if the assignee proceeds under the assignment.

The prayer is for an injunction to restrain said assignee "from in any manner interfering with any of the property of said corporation; that the assignment may be declared void; that the title of the property be decreed to be in the corporation; that the property be turned over accordingly to the corporation; and that some one may be appointed by this court to demand and receive from said Clubb, receiver aforesaid, when he, the said Clubb, shall be directed by the said St. Louis circuit court to turn over the said property of said defendant corporation, now in his possession, such property, and the same to hold, subject to the order and decrees of this court," etc. Does not the foregoing analysis of the bill, with its prayers for relief, show most distinctly that this court is asked to enjoin the proceedings of a state court which has custody of the property in dispute, and is proceeding to determine the rights of the several parties in interest? At present the state court has custody, but it is apprehended that it is about to turn over the possession and management of said property from the receiver to a duly qualified assignee under the state law, over whom it has full supervision. It is not necessary to decide the bald question whether a state assignee who has given bond, etc., in a state court can be interfered with by injunction from this court.

The force of decisions read from the United States Reports is fully appreciated, and the clear distinction observed between judgments in federal courts against state assignees, administrators, etc., and the modes of enforcing said judgments, which, when rendered, are against them in their representative capacity, payable out of assets in their hands. Whatever may be the apparent doubt arising from the cases cited, it seems

clear that the case before this court involves no such difficulties; for it is disclosed in the bill that its purpose is to interfere directly with pending proceedings in the state court — practically, to direct what order it shall make as to the future custody or control of property now in the possession of its receiver; or, in other words, that its judgment shall be restricted in a certain way so that it cannot adjudge what, to it, law and right may seem to demand. An analysis of the authorities cited will show that in no well considered case has a United States court ever issued an injunction, directly or indirectly (except in bankruptcy matters), to restrain proceedings pending in a state court; nor has it respected any injunction or other mode of interference with its jurisdiction. There has seldom arisen any conflict of jurisdiction since the organization of the United States government, because both federal and state courts have, with rare exceptions, observed the obvious rule of comity, and the federal courts have strictly complied with the provisions of the act of 1793, prohibiting injunctions of the kind claimed here.

It is true, there has been some apparent diversity of views as to concurrent jurisdiction in certain classes of cases, as of administrators, etc., settling estates under local laws. It never has been disputed that a non-resident creditor or distributee could maintain suit against an administrator; but when judgment was had, it had to take its place under the classification of demands by the local law, instead of being enforced by execution against the administrator or the assets in his hands.

The case of *Toudley* v. *Lavender*, 21 Wall. 276, sufficiently explains the rule and the reason on which it rests. The following cases, cited by the respective counsel, divide themselves into two classes: (1) Will a federal court interfere by injunction with proceedings in a state court? Under this head it must necessarily be determined whether such matters as are here sought to be enjoined are within the purview of the rule. (2) Whether, despite proceedings pending in a state court, a non-resident cannot sue in a federal court, as in probate mat-

ters, and obtain judgment against an administrator, to be collected as stated in 21 Wall. *supra.*

The first proposition is the only one now before this court. A provisional injunction is asked under the facts heretofore recited to prevent the assignee from taking possession of or interfering with the corporate property, even if the state court should, in discharging its receiver, so order. That property is now *in custodia legis.* What the action of the state court may be is not disclosed, and cannot now be known. It remains for that tribunal, without interference from this court, to make such final orders with respect thereto as, in its judgment, the law and facts require. The embarrassment under which parties may labor, if this court does not usurp jurisdiction, are far less than if conflicts of jurisdiction arise. It may be that great loss and injury will result if the corporation is not permitted to proceed with its business, affecting the navigation of the upper Mississippi, and that, as urged, this important enterprise may be wrecked, to the detriment of all parties in interest, unless this court intervenes by injunction. That argument cannot prevail against the prohibition of the statute; nor is it seen how the corporation or plaintiffs would be profited pending this litigation if the assignee is enjoined from acting. It must suffice that, on the record, it sufficiently appears that this court has no power to grant the provisional injunction.

The following are the principal cases cited by counsel, which have been fully examined and considered: *Diggs* v. *Walcott*, 4 Cranch, 179; *Watson* v. *Jones*, 13 Wall. 719; *Haines* v. *Carpenter*, 91 U. S. 254; *Chaffin* v. *St. Louis*, 4 Dillon, 19; *Dial* v. *Reynolds*, 96 U. S. 340; High on Injunctions, 109, 110, 111; *Erwin* v. *Emory*, 7 How. 172; *Suydam* v. *Boyd*, 14 Pet. 67; *Union Bank* v. *Jolly*, 18 How. 503; *Green* v. *Creighton*, 23 How. 10; *Payne* v. *Hook*, 7 Wall. 425; *Toudley* v. *Lavender*, 21 Wall. 283; *January* v. *Powell*, 29 Mo. 241.

McCrary, *Circuit Judge (concurring).*— The rule is that no injunction shall be granted by any court to interfere with

the possession, control or disposition of property which is in the hands of another court of co-ordinate jurisdiction. The reason for the rule is that its disregard would lead to conflicts between courts of equal authority, and recognizing no common arbiter, which conflicts might lead to the most serious and disastrous consequences. The great importance of the strict observance of this rule in the administration of justice in our state and federal courts has always been recognized in both forums, and for reasons which at once suggest themselves as very cogent.

I am disposed, so far as I am concerned, to uphold it fully, and even in cases of doubt, to lean towards the adoption of that view which cannot possibly lead to conflict. The *fact* in the present case is that the property is now in the custody of the state court. The possession of the receiver under the circumstances is the possession of the court itself, and the disposition of the property by the receiver is a matter to be ordered by the court, which has a perfect right to dispose of it as it pleases. That court has control not only of the property, but also of the receiver and the assignee, who are both before it, and in the exercise of its undoubted authority it may order the property to be delivered by the receiver to the assignee. It is, indeed, manifest that the apprehension on the part of complainants that the state court will so order was the moving cause of the institution of the present suit. It appears from the record before us that in the course of proceedings in the state court, the corporation, the receiver and the assignee all being present in court and fully heard, that court decided that it is its duty to determine to whom the property shall be delivered when the receiver shall be discharged. In this I have no doubt that court is right. It has jurisdiction of the property and of the parties claiming it. It may be that the assignee is not an officer of the state court in the same sense as if appointed by the court; but it is manifest that, from the moment an assignment is made under the state laws, the assignee is for some purposes subject to the

orders of the state court. This is, however, not very material here, for it appears that the assignee has actually appeared in the state court to claim the property, and is now claiming it in that forum, and that the state court has decided that as the record now stands in that court he is entitled to it. It would certainly be a most unseemly interference on our part to attempt at this stage of the proceeding to take the control of the property out of the hands of that court. Suppose we should, by a preliminary injunction, restrain the assignee from acting under the assignment and from taking the property, what right or authority have we to forbid the state court to order the property delivered to the assignee? It is the plain duty of that court, when it comes to discharge its receiver, to determine and direct him as to the disposition of the property in his hands. How can we enjoin the assignee from receiving the property without interfering with a disposition of it which the state court may make and has a perfect right to make in the exercise of its prior jurisdiction? We cannot, of course, say in advance that the state court will or will not order the property delivered to the assignee. If it has jurisdiction to so order, and *may* so order, that is enough. We must recognize and respect the right of the court to determine the question either way according to its judgment, and not according to ours. If we interfere to determine it in advance, by preliminary injunction, we are plainly attempting to control the action of that court. It is no answer to say that we do not enjoin the court, but only the assignee. It may often happen that an injunction to restrain public officers or private persons, if granted and enforced, will, in effect, tie the hands of the court under whose orders they are to act. If, for example, a party subject to the jurisdiction of a state court is enjoined by a federal court from obeying the orders of the former, this is an interference with the court as well as with the individual. And the difficulty is not lessened — it is rather increased — by issuing the injunction in advance of the order of the state court, but after it has possession of the subject.

It follows that application for relief by injunction, upon the grounds stated in the bill, must be addressed to the state court, which has possession of the property, control over the several claimants, and power either to order or forbid delivery to the assignee.

JOHNSON *v.* LEWIS and others.

(Eastern District of Arkansas. May, 1881.)

1. TRUST — PARTNERSHIP. — Where a trust is created by deed, which contemplates the purchase of municipal bonds (the legal title to which is vested in the trustees) by a fund raised by the sale of certificates payable to bearer, which entitles the holder to participate in the income and in the distribution of the securities by a drawing, in a mode prescribed in the deed, the relation of partners does not exist between the certificate holders. Whether such a trust is illegal under the English Companies act, 1862, *quære.*
2. NEGOTIABLE PAPER — TITLE OF PURCHASER. — The rule that the purchaser of a chattel acquires no better title than his vendor possessed has no application to negotiable paper. The party who takes such paper before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title good against all the world.

In equity.

Palmer & Nicholls, Tappan & Hornor and *Charles C. Waters*, for plaintiff.

Eben W. Kimball, for defendants.

CALDWELL, *District Judge.* — The plaintiff was the holder of $10,000 in negotiable bonds issued by the county of Phillips, in this state, which he placed in the hands of W. N. Coler, on the twenty-sixth day of June, 1874, "to be sold at sixty cents, and accounted for at same, less a commission of two and one-half per cent." Coler sold the bonds to the Municipal Trust, of London, England, in October, 1874, for eighty-five cents on the dollar, receiving a part of the price agreed to be paid therefor in cash, and the balance in certificates of the trust. Suit was afterwards brought against the county on the bonds and judgment recovered thereon in favor of the trust,

and the judgment assigned to Lewis. Thereupon the plaintiff filed this bill, in which he seeks to reclaim the bonds and their proceeds upon the alleged ground that Coler had never accounted to him for the bonds, and that he transferred them to the trust for money and certificates of stock in fraud of plaintiff's rights, of which the agents of the trust had full notice.

The trust was constituted by a deed dated the fifteenth day of December, 1873, which was made between certain parties of the first part, styled "the trustees," certain parties of the second part, called "the committee," and certain parties of the third part, called "the covenantees."

The scheme contemplated subscriptions to raise a fund for the purpose of purchasing bonds of municipalities within the United States. The bonds were to be purchased by "the committee" named in the deed, and placed in the possession of the banker of the trust by the trustees. Subscribers to the fund received certificates, payable to the bearer, which entitled the holder to participate in the distribution of the profits and proceeds of the trust investments by a drawing in a mode set out in the deed, which, in some of its features, closely resembled a lottery. The capital of the trust was fixed by the deed at £350,000. The committee of the trust purchased from Coler bonds, including those of Phillips county, valued at £217,550 12s. and 10d., for which he was paid in cash £135,000 12s. and 10d., and the remaining £82,555 was paid him in certificates of the trust, which two witnesses testify were, at the time, par or a little under. The trust was not a corporation or joint-stock company or partnership, but a trust formed by deed of settlement for the purpose of securing investments. The trustees were the legal owners of the trust property, and the business of the trust was managed by them and "the committee" created by the deed for the benefit of the certificate holders, who were strangers to each other, and who entered into no contract between themselves, nor with any trustee on behalf of each other, and were not, therefore, partners.

It is a question whether this trust was not obnoxious to the provisions of the English Companies act, 1862, and illegal. According to the opinion of the master of the rolls in *Sykes* v. *Beadon*, Solicitors' Journal, April 12, 1879, p. 464, it was; but in *Smith* v. *Anderson*, reported in London Times, July 17, 1880, the court of appeals overrule *Sykes* v. *Beadon*.

The question is not material in this case, for in any event the certificate holders who contributed the money to purchase and pay for the securities are in equity entitled to them and their proceeds, to be distributed among them according to the scheme of the deed, or in some equitable mode.

The evidence shows very clearly that the bonds were purchased from Coler in good faith before their maturity, and without notice of any defect in Coler's title or authority to sell. The only witness whose testimony tends to impeach the plaintiff's title is Coler himself, who testifies that he informed one or two persons, sustaining the relation of agents or managers to the trust, that the bonds were not his property and that he had no authority to use them as he was doing. It is improbable that he made any such statement to any one when he was anxiously seeking to dispose of the bonds; and he is flatly contradicted on all points by the persons to whom he claims he made the statements, and by the members of the committee, who alone had authority to purchase bonds, and who testify they were purchased in good faith. In the written agreement entered into for the sale of the bonds to the trust, he describes himself as "a dealer in American municipal bonds," and as having the possession and control over a large number of such bonds, "which he is duly authorized to sell and dispose of," and it is not reasonable that on the eve of consummating a sale of a million and a quarter of bonds, which he had been working for months to bring about, he would make a voluntary confession of want of authority which would at once put an end to his enterprise. Besides, his conduct in the transaction is not such as to inspire confidence in his honesty or veracity. He received the bonds to sell at sixty

cents, for which he was to receive two and one-half per cent. commission. He sold them for eighty-five cents, receiving nearly sixty cents of this sum in cash and certificates of the trust for the balance, worth at the time par or a little under, and has never paid Johnson, from whom he received the bonds for sale, a single cent. The defendants having purchased the bonds from Coler in good faith are entitled to retain them.

Mr. Story says: "If an agent is entrusted with the disposal of negotiable securities or instruments, and he disposes of them by sale or pledge, or otherwise, contrary to the orders of his principal, to a *bona fide* holder without notice, the principal cannot reclaim them. The reason is that the principal, in all such cases, holds out the agent as having an unlimited authority to dispose of and sell such instruments as he may please." Story on Agency, § 228.

The common-law rule, that the purchaser of a chattel acquires no better title than his vendor possessed, has no application to negotiable paper. "The possession of such paper carries the title with it to the holder. 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title good against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession." *Murray* v. *Lardner*, 2 Wall. 110; *Hotchkiss* v. *National Bank*, 21 Wall. 354. Tested by these settled rules the plaintiff's case fails.

Injunction dissolved and bill dismissed.

BERGER *v.* COUNTY COMMISSIONERS OF DOUGLAS COUNTY.

(District of Nebraska. November, 1880.)

1. REMOVAL — ASSIGNEE — ACT OF MARCH 3, 1875, §§ 1, 2. — The first and second sections of the act of March 3, 1875, should be construed together as *in pari materia*, and therefore a removal should not be allowed in a case where the plaintiff is an assignee, unless his assignor might have brought suit in a federal court.
2. SAME — FEDERAL QUESTION — DECREE OF FEDERAL COURT. — A suit to recover taxes erroneously levied by the officials of a county, under a state statute, does not involve any federal question, although the invalidity of such taxes has been established by the decree of a federal court.

J. M. Woolworth, for plaintiff.

J. C. Cowin, for defendant.

MCCRARY, *Circuit Judge.* — The first section of the act of congress of March 3, 1875, provides, among other things, as follows: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

The second section of the same act provides for the removal, on the application of either party, of cases brought in any state court involving more than $500, and "in which there shall be a controversy between citizens of different states."

In the present case the suit when instituted in the state court was a controversy between citizens of this state, but the original plaintiff, after commencing his suit, assigned the cause of action to the present plaintiff, who was substituted upon the record as plaintiff, and, being a citizen of Colorado, thereafter moved for and obtained an order of removal on the ground of the citizenship of the parties.

It is conceded that, unless the case presents a federal question — of which I will speak presently, — the plaintiff could

not have brought his suit originally in this court; but it is insisted that, inasmuch as the second section of the act above named, which provides for the removal of causes from the state to the federal courts, does not contain the prohibition against suits by assignees, a case of this character may be brought here by removal. The somewhat analogous sections of the judiciary act of 1789 (sections 11 and 12) were considered by the supreme court in *Bushnell* v. *Kennedy*, 9 Wall. 387. In that case the court said: "The restriction in the eleventh section is not found in the twelfth; nor does the reason for the restriction exist. In the eleventh section its office was to prevent frauds upon the jurisdiction, and vexation of defendants by assignments made for the purpose of having suits brought in the name of assignees, but in reality for the benefit of assignors. In the twelfth it would have no office, for the removal of suits could not operate as a fraud on jurisdiction, and was a privilege of defendants, not a hardship upon them."

It is manifest that this reasoning has no application to the act of March 3, 1875, which gives the right of removal to either party. Under the judiciary act, inasmuch as the privilege of removal belonged only to the defendant, it was, as the supreme court well said, impossible for plaintiffs to perpetrate frauds upon the jurisdiction by assigning claims to non-residents for the purpose of having suit brought in the state court and removed thence to the federal courts. A plaintiff could not remove a case under that act. But, under the act of 1875, since either party may remove, it is evident that great frauds upon our jurisdiction may be perpetrated with impunity, if the assignee of any claim founded on contract may institute suit in a state court, and at once remove the cause to this court.

All the evils (and they are very serious) which congress intended to prevent by the inhibition of suits by assignees in the cases specified are made not only possible, but easy, under the removal act, if it is to receive the liberal construction contended for by plaintiff's counsel. It is impossible to imagine

a case in which suit in this court by an assignee is prohibited by the first section of the act of March 3, 1875, and in which the same suit may not be indirectly brought here under the second section of the same act, if the two sections are not construed together, or if it be held that a non-resident assignee may, in all cases of suits founded on contract, remove the cause on the ground of his citizenship. By this construction of the act of 1875, we would point out the mode whereby one citizen of Nebraska, holding a claim against another citizen of that state for more than $500, may assign his claim to a citizen of a neighboring state, who can bring his suit thereon into this court, provided only he comes through a state court.

When we consider that the federal courts are few in number and widely separated from each other; that many citizens reside at places far distant from them; that their dockets are overcrowded with cases, and that litigation in them is tedious and sometimes ruinously expensive, we perceive at once the wisdom of those provisions of the statute which have stood from 1789 until the present, which were intended to confine our jurisdiction, in cases where it depends upon the citizenship of the parties, to *bona fide* controversies between citizens of different states. And in order to secure this end it is necessary to prohibit the assignment of causes of action to non-residents, for the purpose of bringing suit either directly or indirectly in the federal courts. I am therefore of the opinion that the first and second sections of the act of March 3, 1875, should be construed together as *in pari materia*, and, being so construed, the right of removal should not be allowed in a case where the plaintiff is an assignee, unless his assignor might have sued in this court.

It is insisted in the second place, that the case involves a question arising under the laws of the United States. It is so stated in the petition for removal, but we are not bound by that statement. We are at liberty to look into the record and determine from that what the controversy is, and whether it involves a federal question. The plaintiff here sues to recover

taxes erroneously levied and collected by the authorities of Douglas county. The statute of the state gives the right of action. No question under any act of congress can arise. The fact that there is a decree of this court establishing the invalidity of the taxes in question does not change the character of the suit. That decree is simply an item of evidence in the case, and its conclusiveness, its construction or its effect does not require the construction of any law of the United States. We do not decide upon the question whether this case was "brought" in the district court of Douglas county within the meaning of the first section of the act of 1875. It was instituted as a claim against the county, presented to and prosecuted to a decision before the board of county commissioners of that county, from whose decision rejecting the claim an appeal was prosecuted to the district court. These facts present a question of some doubt as to whether the suit was "brought"— that is, instituted, commenced — in the district court; and if it was not, it was not removable. But the conclusions reached upon the other points in the case render a decision of this question unnecessary.

The motion to remand is sustained.

BURDICK, Assignee, *v.* GILL and Wife.

(District of Iowa. April, 1881.)

1. FRAUDULENT CONVEYANCE — PRESUMPTION OF FRAUD.— Fraud will be presumed where a voluntary conveyance to a wife is followed within a short time by the fraudulent disposition of the remaining estate of the grantor.
2. SAME — SUBSEQUENT CREDITORS.— Such conveyance will be void as to all subsequent as well as all prior creditors of the grantor.
3. SAME — PROOF OF INJURY.— It does not *seem* to be necessary to show injury to the creditors, in addition to a fraudulent intent, in order to avoid a conveyance upon the ground of fraud.
4. SAME — SAME.— If, however, a person, when about to contract debts, makes a voluntary conveyance, with the actual intent to deprive his future

creditors of the means of enforcing collections of their debts, and this purpose is accomplished, such subsequent creditors are unquestionably thereby *injured*.

In bankruptcy. Appeal from district court.

Clark & Heywood and *Gillmore & Anderson*, for assignee.

Herschl & Preston, for Sarah Gill.

McCrary, *Circuit Judge.*— The complainant, as assignee in bankruptcy of Potter Gill, brings this bill in equity to set aside a conveyance of certain real estate made by the bankrupt to his wife, the respondent Sarah Gill, and to subject the same to the payment of the debts of the estate. The petition in bankruptcy was filed by the bankrupt in the district court on the eighteenth of April, 1878. On the second day of January preceding he made the conveyance in question to his wife. It is conceded that the conveyance was voluntary. It is also conceded that there are no creditors now complaining whose debts were contracted prior to the conveyance, and the sole question in this case is whether said conveyance was fraudulent and void as to subsequent creditors.

1. Was the conveyance from the bankrupt to his wife made with intent to defraud subsequent creditors? This is the first inquiry. The following are the badges of fraud relied upon to establish the affirmative of this proposition: Very soon after the conveyance, Gill commenced disposing of his property with intent to defraud his creditors. He sold off his stock of furniture, and, according to his declarations, he sold it at less than cost. He destroyed or secreted his books of account. He bought largely on time, but sold very rapidly, so that when the assignee took possession, on the twentieth of May, 1878, the goods on hand inventoried only $244, while the claims proved, and which must have been contracted within the preceding ninety days, amounted to $2,700. He is shown to have made several sales, the proceeds of which he fails to account for. About the sixteenth of April he sold a farm and

received $675 cash on the purchase money. This proof is sufficient to show the fraudulent intent of Gill, and it is fair to infer, from all the facts and circumstances, that the conveyance to his wife was a part of his general plan and scheme of fraud. The time that elapsed between the date of the conveyance and the first of the admittedly fraudulent acts is so short as to afford a clear presumption that they all belong to and form a part of the conspiracy. It will not be presumed that the gift to his wife was honest and *bona fide*, when we find that it was followed within a month by the inauguration of a scheme to dispose of what remained for the purpose of defrauding creditors. The intent may be collected from the circumstances and need not be shown by direct and positive proof. Bump on Fraudulent Conveyances, 309. And among the prominent badges of fraud are the "immediate engagement in hazardous business, and the contracting of debts immediately after the transfer." To which we may add, in this case, the fraudulent disposition of the remaining estate of the grantor very soon after the conveyance.

2. The well settled rule is that where a conveyance is intentionally made to defraud creditors, it is void as to all subsequent as well as prior creditors; and it is certainly within the rule to say that if the conveyance is made with a view to defrauding subsequent creditors, it is as to them void, although all prior creditors are paid in full. Story's Eq. Jur. 362 *et seq.;* Bump on Fraudulent Conveyances, 311; *Sexton* v. *Wheaton*, 8 Wheat. 229; Kerr on Fraud and Mistake, 206, 207; 1 Am. Lead. Cases, Hare & Wallace's Notes (5th ed.), 42, and cases cited in note 2. The general doctrine asserted by these authorities is not questioned, but it is insisted that the complainant must show not only the intent to defraud subsequent creditors, but that such creditors have actually been injured thereby. It is insisted that the intent to defraud is not enough if no one is, in fact, injured. I do not find that this distinction is noticed in the books; but even if sound I do not think it can avail respondents in this case.

If a person, when about to contract debts, makes a voluntary conveyance with the actual intent to deprive his future creditors of the means of enforcing collection of their debts, and this purpose is accomplished, I am very clearly of the opinion that such subsequent creditors are injured and defrauded. A creditor has a right, when extending credit, to rely upon the honesty and good faith of the debtor. He may assume without inquiry that the debtor has made no fraudulent conveyances of property. The debtor cannot be heard to say: "My creditor might have learned that I intended to defraud him," if he had searched the records or made inquiry.

The creditor has a right to rely upon all property of the debtor which in law or equity is liable for the debt, and this includes such as may have been conveyed with a view to deprive him of his remedy. The creditor is entitled to whatever remedy by judgment, execution and the sale of property he would have enjoyed had the fraudulent conveyance never been made. As to him it is void because intended to defraud him, and because, if not set aside, he would be deprived of a substantial right, to wit, the right to levy upon and sell the property conveyed for the payment of his debt. The authorities cited by counsel for respondents, rightly understood, are not in conflict with this doctrine. If they were I would not follow them.

The decree of the district court will be affirmed.

FALLS WIRE MANUFACTURING COMPANY *v.* BRODERICK.

Eastern District of Missouri. March, 1881.)

1. REMOVAL — COUNTER-CLAIM — AMOUNT IN DISPUTE — ACT OF MARCH 3, 1875. — The claim of the plaintiff, and not the counter-claim of the defendant, should fix the amount in dispute, in determining the right to remove a cause from the state court under the act of March 3, 1875.

Motion to remand.

Louis R. Tatum, for plaintiff.

Noble & Orrick, for defendant.

TREAT, *District Judge.*— The plaintiff, an Ohio corporation, brought suit in the state circuit court for less than $300, the defendants being citizens of Missouri. The defendants appeared (February 8th) and filed an answer and counter-claim. The counter-claim is based on an alleged contract in writing, for the non-performance of which the defendants have sustained damages (unliquidated) in the sum of $1,000. No written contract was filed, or *profert* thereof made. On the following day the defendants filed a petition for the removal of the cause to this court. Under the act of March 3, 1875, the defendants, though citizens of Missouri, had a right to the removal, the plaintiff being a citizen of another state, provided the amount in dispute exceeds $500. The plaintiff claims less than $500, but the defendants, by way of counter-claim, demand $1,000. The Missouri statute requires that the written contract on which such counter-claim is based should be filed; and under the more recent decisions of the supreme court of Missouri, if not filed, a motion to dismiss, etc., would lie. But the defendants having filed their answer and counter-claim on February 8th, but not the written contract, appeared next day, February 9th, with petition, etc., for removal to this court, an order for which was duly granted. The act of 1875 provides for the removal of a civil suit "where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * in which there shall be a controversy between citizens of different states." Hence the parties are within its terms as to citizenship. Are they as to the amount in dispute? Judge Blatchford has recently held *(Clarkson* v. *Manson*[1]), in a case similar to this, that, although the plaintiff's demand was

[1] U. S. Circuit Court, Northern District of Illinois. N. Y

for less than $500, yet as the defendant's counter-claim for judgment over was for more than $500, the cause was removable. If that be a true interpretation of the act, the door for removals is wide open, whenever a defendant, for purposes of delay or other wise, chooses to interpose a counter-claim for more than the prescribed sum; thus drawing into United States courts the trial, through the device of a counter-claim, of any cause in which the amount claimed by plaintiff, although less than $500, is to be determined. It may be, on the other hand, that the original demand in the state court is for a small sum, while the real dispute involves thousands of dollars. How shall a United States court avoid fraud on its jurisdiction on one hand, and preserve the just right of removal on the other? Must it await the final outcome, and then render judgment as the facts may require, pursuant to the terms of section 5 of the act of 1875, by remanding or dismissing?

An important inquiry in this case arises under section 6 of said act, viz.: "That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and said proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal." The purpose of this section is, obviously, that all proceedings after removal shall be as if the suit was originally brought in the United States circuit court, and all had in the state court before removal shall stand on the same footing. Hence, when the answer and counter-claim were filed, February 8th, in the state court without the alleged contract in writing, the plaintiff could have interposed a motion for dismissal; but, as the case was removed to this court before opportunity given for such motion, his right to do so still remains. Suppose such a motion interposed here and sustained, what would be the *status* of the case? Under section 5 no dismissal of the case should be had, for the plaintiff would not be at fault. If the counter-claim is dis-

missed, and the case remanded after such dismissal, what effect would such dismissal have, jurisdictionally, it being rendered by a court that had thus decided its own want of jurisdiction in the premises? The act of congress (section 5) provides that when it shall appear to the United States circuit court that the dispute is not properly within its jurisdiction, it "shall proceed no further therein, but shall dismiss the suit, or remand it," etc.

Hence, it seems that the first inquiry, on proper motion, is to ascertain whether on the papers, as transmitted to this court, it will remand, sustain a motion to dismiss the counter-claim, or will permit the defendants here to do what should have been done in the state court. Under the later rulings of the Missouri supreme court the counter-claim is subject to dismissal on motion. If such a motion is made and granted, the case will have to be remanded. The anomalous position the case will then occupy in the state court cannot be avoided.

The judgment of this court for dismissal of counter-claim, if its jurisdiction is to be thus determined, may or may not prevent the state court from allowing the same to be reinstated and the filing of the written contract. All this court will have decided is that the motion to dismiss the counter-claim is sustained, whereby it will have decided that it has no jurisdiction of the case, and that the same should be remanded at defendant's costs. If the motion to remand in the present state of the record is overruled, then, under section 5 of the act of 1875, it may appear through proper motions that this court has not properly jurisdiction of the case, and the order to remand may hereafter be granted. The supreme court of Missouri has held that under the state practice act *profert* is not necessary; and that advantage of the non-filing of a written contract must be taken by motion. If a case is removed to this court without opportunity for making such a motion in the state court, and such motion is made here, will this court permit such contract to be filed here, and thus give the case here a position, jurisdictionally, different from what it had

when removed? Can the removing party thus obtain jurisdiction, or escape the consequences of his position in the state court? Must he not abide by the record as it stood? Or may he assume that, as no motion to dismiss was made before removal, the case here has the same *status* as if the contract had been filed before removal? These difficulties are suggested with a view of determining the true meaning of the statute as to the amount in dispute. Under the act of 1789, the defendant, on entering his appearance, had to then file his petition for removal, and there is a long line of decisions that the amount was to be determined by plaintiff's demand. Indeed, no other criterion could be had in the then state of the record. Since then various acts of congress have granted permission to remove at other stages of the proceedings, but none has changed the rule as to the amount in dispute, or the rule by which it is to be ascertained, unless the adoption of the state practice has so done under the acts of 1872. The rules of law, as established before state practice as to counter-claims existed, are familiar. Is it to be supposed that the uniform rulings of the United States court were intended to be overturned, as to removals, by the act of 1872, independent of all the statutes and decisions concerning the removal of causes?

While the practice acts of the state may prevail as to the pleadings, etc., under the United States act of 1872, they cannot enlarge or change the United States acts concerning removal of causes from state courts. The amount in dispute still continues to be what plaintiff claims, and not what by counter-claim the defendant may demand.

Motion to remand sustained.

STEIGER and others *v.* THIRD NATIONAL BANK.

(Eastern District of Missouri. April, 1881.)

1. FACTOR — PLEDGE OF GOODS — STATUTES OF MISSOURI. — Under the statutes of Missouri a factor is not authorized to pledge the consignor's goods for an amount beyond the sum of the advances and charges thereon.
2. SAME — CONVERSION — TENDER. — In such case a tender of the advances and charges must first be made by the consignor before suit can be maintained for the conversion of the goods.

Demurrer to answer.

George A. Madill and *Henry E. Mills*, for plaintiff.

Overall, Judson & Tutt, for defendant.

TREAT, *District Judge.*—The plaintiffs aver that they shipped certain chattels (described) to their factors in St. Louis for sale; that said factors, without plaintiffs' consent, pledged the same to the defendant, with full knowledge on the part of the defendant that the pledgors were plaintiffs' factors, and that said chattels were the property of the plaintiffs, and that the plaintiffs demanded of the defendant the delivery to them of said property, which was refused. These averments are followed with the formal charge of conversion.

The *answer* states that the plaintiffs were indebted to their factors for charges and advances on the specific chattels, without stating the amount thereof; that said chattels had been deposited in a warehouse, and a warehouse receipt therefor given to the factors; that said factors pledged to the defendant said chattels and warehouse receipt in order to raise means to pay said charges and advances; and that the defendant, "on the faith of said goods and chattels and warehouse receipt, duly indorsed by the factors, loaned to said factors $10,557.37, which sum is still due and unpaid." The answer does not aver that said sum loaned was the amount of advances, etc.

The second defense is that the defendant did not know, etc., that, as to said chattels, the plaintiffs were owners or consignors thereof, and that the pledgors were factors merely; but, on the contrary, that said alleged factors, having the warehouse receipt, and the defendant believing said factors to be the owners, the defendant did, "on the faith of said receipt," etc., loan said sum of money to said factors, whereupon said chattels were transferred to the defendant, and said warehouse receipt indorsed and delivered.

The demurrer is to the first and second specific defenses, as stated. The *first* is designed to raise the question whether a factor cannot, under the Missouri statutes, assign a warehouse receipt, and pledge the chattels to raise money for advances and charges to an indefinite amount, even if the pledgee knows the factor's relation to the property. If not so, the amount of said advances and charges ought to have been stated, so that it would appear whether the pledge was for a larger sum than the factor's lien. It is intended to assert that if advances and charges exist, or are about to be created, the factor may pledge *generally*, even when the pledgee knows the precise relation of the factors to the property.

The *second* defense raises the question whether a party receiving an assignment of a warehouse receipt, believing the assignor to be the owner of the property, cannot hold the same against the real owner for the amount loaned on the faith thereof, irrespective of the state of the accounts between consignor and consignee.

A full review of the subject would be advisable, if time permitted, requiring an analysis of the various decisions and the statutes under which they were made; but such a review would compel a consideration, not of elemental principles alone, but of their modifications through English and American statutes, in the light of judicial interpretation of the respective statutes; such a review looking to the true interpretation, persuasively, of the Missouri statutes.

In 18 Missouri, 147, 191, the true doctrine of the common

law was stated and enforced, to wit, that a factor could not pledge his principal's goods. Prior to that time, both in England and in some of the American states, the rigorous and just rule at common law had been modified to a greater or less extent.

The Missouri statutes of 1868, 1869 and 1874 are in accord. Thus the act of 1868 authorized the transfer of a warehouse receipt by indorsement thereon, whereby the transferee is to be deemed the owner of the goods, "*so far as to give validity to any pledge, lien or transfer made*," *etc.: provided*, that if the words "non-negotiable" were written or stamped on said warehouse receipts, etc., the act would not apply. This statute, with the exception in the proviso mentioned, permitted a transfer by indorsement of a warehouse receipt, *so far as to give validity to the pledge, lien and transfer.* Prior to that act, as had been decided by the Missouri supreme court in the two cases *supra*, no such pledge could be made. The act of 1868 authorized the pledge in the manner stated to the extent of the factor's lien. Section 6, Act of March 13, 1868.

But it is contended that section 10 of said act gives a broader effect to such transfers, for it provides that warehouse receipts, etc., "shall be negotiable in blank, or by special indorsement, in the same manner and to the same extent as bills of exchange and promissory notes now are." Was this section designed to cut off all equities between consignor and consignee, when a transfer of the receipt had been made to an innocent transferee for value? If so, were demand on the principal and notice to the indorser required to hold the parties to said receipt personally liable for property for an undetermined value, not like bills of exchange, etc.? Or was it designed to effect merely a valid pledge of the property, through indorsement of the receipt, without a personal liability on the part of the warehouseman for more than the specific property?

It is obvious that if the warehouse receipt was to operate as a bill of exchange the primary element of such a bill would be eliminated, viz., *a sum certain;* and also demand on the

warehouseman at maturity would be required, with due notice, as by the law merchant. But the warehouse receipt may not fix a day certain on which delivery is to be made, nor does it contain any other of the essential requisites of a bill of exchange, whereby the law merchant can fasten on the parties to the paper their respective liabilities. The original contract was between consignor and consignee. The latter received the goods to sell for the benefit of the consignor. Could he without consent of the consignor place the same in a warehouse, and then turn over the warehouse receipt to some other person, and thus convert a contract resting in personal confidence and trust for the sale of the property into a general authority to any and every one to whom the receipt might be pledged, or who thus gets manual or symbolical possession of the property, to sell the same with or without accounting to the consignor for the proceeds thereof? To so hold would be subversive, not only of all rights of property, but of all laws of contract between consignor and consignee. Does then the clause in the statute as to *negotiability* imply or require any such overturn of *elemental* principles? Was the contract between consignor and consignee assigned, as well as rights of property? As will be seen hereafter the United States supreme court has determined the true meaning of the term employed in this and like statutes.

The act of 1868 (Missouri statutes) denounces penalties against a factor who does not account for or pay over to his principal the amount received on the negotiation, pledge, etc., of goods consigned. Does that imply that a negotiation or pledge may be made by the factor for more than his lien, he alone to be answerable for the surplus, and that the pledgee may not be also held for the surplus? Is not that section intended not to exonerate the indorser or transferee from liability to the consignor, but to add to the consignor's security those penal provisions? The Missouri act, March 4, 1869, repeats the provisions of the act of 1868, *supra*, as to *negotiability*, and in section 2 declares that the indorsee of the receipt

shall be deemed the owner of the goods, "so far as to give validity to any pledge, lien," etc., "*as on the faith thereof*," with the same proviso as in the former act. The repeal of certain sections in the former act does not affect the present inquiry further than is needed to interpret the force and effect of the terms, "as on the faith thereof." Does the insertion of these words *enlarge* or *restrict* the rights of the indorsee? By the prior statute the simple indorsement caused the indorsee of the receipt to be deemed the owner, so far as to give validity, etc.; but it must have appeared to the legislature that such a provision left the door to fraud wide open, and hence in the act of 1869 the relationship of the indorsee seeking the benefit of the transfer was confined to a *bona fide* indorsee; or, in the language of the act, to a transfer, pledge, etc., made "on the faith" of the warehouse receipt. Such being the condition of the statutes, the act of March 28, 1874, was passed, evidently designed to punish fraudulent factors and warehousemen, restricting their negotiations and pledges of bills of lading and warehouse receipts to cases where the owner or consignor gives *written authority* therefor; hence the proviso to the act, which is in the following words: "*Provided*, that nothing herein shall be construed to prevent such consignee or other person lawfully possessed of such bill of lading or warehouse receipt from pledging the same *to the extent of raising sufficient means thereby to pay charges for storage and shipment or advances drawn for on such property by the owner or consignor thereof, and a draft or order by the owner or consignor thereof; and a draft or order by such owner or consignor for advances shall be held and taken to be 'written authority,'* within the meaning of this section, for the hypothecation of such bill of lading or warehouse receipt to the extent, and only to the extent, of raising the means to meet such draft and to pay such freight and storage." Under this penal act the only question presented is whether a pledgee is deprived of his rights as such pursuant to prior acts, unless written authority from the *owner or consignor* by draft, order

or otherwise is presented to him at the time of pledge made; or whether the pledge made without such written authority merely imposes upon the factor the penalties denounced, without invalidating the transfer.

It cannot be disputed, in the light of the decisions *supra*, 18 Mo. Rep. (which were in full accord with settled principles), that a factor could not pledge for his debt the goods of the principal. Such being the received doctrine in England and America, an act of the British parliament was needed to modify the rule as to Great Britain, and acts by several states in this country, more or less in accord with the acts of George IV. The first and most important inquiry is as to the force of the statute concerning the negotiability of warehouse receipts, etc.

In the case of *Shaw* v. *R. Co.* 101 U. S. 557, the doctrines involved were fully considered; the statutes under consideration by that court being those of Missouri and Pennsylvania, which were, in this respect, declared to be alike. After a very full and clear exposition of the question concerning negotiability as applied to bills of exchange and bills of lading, respectively, the court said: "It cannot be, therefore, that the statute which made them (bills of lading, etc.) negotiable by indorsement and delivery, or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change wholly their character, put them *in all respects* on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible; such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be

construed as altering the common law further than its words import."

This case is not only very instructive, but authoritative on this court; certainly, in the absence of any interpretation of the Missouri statute by the supreme court of Missouri. The general doctrine as to consignor and consignee, when advances have been made or not made, is fully stated in the opinions of the United States supreme court, 14 Pet. 479 (*Brown* v. *McGraw*), and in 11 How. 209 (*Warner* v. *Martin*).

In 23 Wall. 35 (*U. S.* v. *Villanoga*), the extent of a factor's interest and control of the property is stated.

Another question arises concerning the right of the consignor to maintain his action against the factor or his assignee for the value of the goods, or their commission, when advances, charges, etc., exist, without first tendering the amount of said advances. On this point the authorities are not in accord. Some hold that the consignor may sue for the full value of the goods, as in trover, and the defendant may recoup as to advances and charges, whereby the consignor would recover the surplus to which he is entitled and no more. Other authorities hold that inasmuch as the assignee of the factor holds the property under a lien for advances, etc., the consignor has no right of action until the lien is first removed, except as in *assumpsit* for the surplus. It is useless to review these differing authorities in the light of technical rules, which are now to a large extent obsolete. It is clear that the factor has, in Missouri, a right to pledge the goods consigned to the extent of the advances and charges thereon, and we now hold that he can pledge them no further. If, then, such be his legal right, a suit cannot be maintained on any recognized principle, either against the factor or his pledgee, for the conversion of said goods, unless, after tender and demand, a refusal is made.

Prior to the Missouri statutes, the United States supreme court declared, in *Warner* v. *Martin*, *supra*, that whilst a

factor could not pledge for a debt of his own, and if so pledged the consignor could recover in trover against the pledgee without tender either to the pledgee or factor what might be due to either of them, because the pledge was tortious; still a factor who had a lien on the goods could deliver them to a third person as security to the extent of his lien, in which case a tender of the amount of the lien due the factor must be made before recovery could be had. The opinion of the United States supreme court in that case throws much light on this controversy; for if the contention is that under the Missouri statutes a factor may pledge his principal's goods on the faith of a warehouse receipt, irrespective of the amount of his advances and charges — that is, for any amount he can borrow on the faith of a warehouse receipt,— it becomes important to ascertain if such a doctrine, subversive of the ordinary rights of principal and agent, or consignor and consignee, has any sanction either in statute or otherwise.

In *Warner* v. *Martin*, *supra*, a similar view seems to have been urged, and reliance was had on the act of George IV., c. 94 (1825), the English factor's act. The United States supreme court, having before it both the English and the New York acts, said: "The third section of that (the New York) act provides for those cases where the ownership by the factor of goods which he contracts to sell shall be said to exist, to give protection to purchasers against any claim of the factor's principal. [This is a contract of sale.] It is when he contracts for any money advanced, or for any negotiable instrument or other obligations in writing given for merchandise upon the faith that the factor is the owner of it. The concluding words of the section are, 'given by such other person upon the faith thereof.' Three misconstructions of that act have been prevalent, but they have been corrected by the courts of New York. We concur with them fully. One was that the statute altered the common law so as to give validity to a sale made by the factor for an antecedent debt due by him to the person with whom he contracts; another, that the statute gave to a pur-

chaser protection whether he knew or not that the goods which the factor contracted to sell him were not the factor's, and belonged to the principal; and the other, that the concluding words, 'upon the faith thereof,' related to the advance made upon the goods, and not to the property which the factor had in them."

Without pursuing these inquiries further, it is held that a factor may, under the Missouri statutes, pledge his consignor's goods to the extent of advances and charges thereon; the advances to be evidenced as required, and to no greater extent. It may be urged that a practical difficulty will arise in ascertaining the correct amount of advances and charges; but if that be so, the consignor may reply with greater force that his property ought not to be pledged for more than the factor's lien thereon. The pledgee is not obliged to loan money and receive the pledge as collateral. If he is willing to lend to the factor he can receive as collateral a warehouse receipt to the extent that the factor has a lien on the goods represented; in other words, the factor can pledge what belongs to him — his lien — and not his principal's interests or rights of property. This may be questionable legislation, inasmuch as it enables the pledgee to sell the goods if not redeemed, instead of the agent, in whose personal skill and judgment alone the consignor confided.

If there were advances and charges existing for which the property was pledged, the plaintiffs, to recover in trover or for conversion, should have first tendered the amount thereof. In no event are they entitled to more than the surplus after the lien is discharged.

Here arises the difficulty under which courts and legislatures have labored with respect to the common-law rule and needed modifications thereof. A consignor selects his consignee, on whose skill and personal integrity he relies for a judicious sale of the property consigned. If the consignee advances on the shipment, at the close of the transaction the consignor is entitled to receive the proceeds of the sale, less advances, charges

and commissions. But if the consignee is permitted to pledge the consignor's property to the amount of advances and charges, and the pledgee controls the sale of the property — it may be at forced sale, irrespective of the condition of the market, etc.,— the consignor's right may be sacrificed, his reliance on the personal judgment and skill of his consignee set at naught, and another and injurious mode of disposing of his property pursued — a mode never contemplated by him. Still, if such a mode is lawful, he is compelled to submit thereto. How, then, shall he be bound, as in favor of the pledgee, for advances? or, in other words, to what evidence of advances made or to be made shall the pledgee be confined? The act of 1874, *supra*, gives the rule. There must be written authority for advances, and a draft or order drawn by the consignor against the shipment is to be considered such written authority. It is thus under statutory safeguards that the consignor may make his shipments. He knows that his consignee may pledge for charges, but cannot pledge for advances without written authority as by draft or order. Hence, justice is wrought. Unless he receives an advance, or by written authority orders such to be made, his property cannot be pledged therefor. It is very easy for the pledgee to call for the written authority, such as the statute requires, and if he takes a pledge from the factor for supposed advances, when no written authority exists, he cannot hold the property therefor against the consignor's rights.

The decisions in Wisconsin and elsewhere, looking to different conclusions from those reached by this court, have received careful consideration. There is nothing in the Missouri statutes to justify a factor's pledge for more than advances and charges, and the evidence of advances is confined to written authority therefor. A factor cannot sell or pledge for his individual debt, but he can sell to pay such advances and charges, or pledge therefor, or sell in the usual course of business, irrespective of advances and charges. The protection of the consignor requires the enforcement of the statutory rules,

which, as existing, are a relaxation of the common-law doctrines, and ought not to be construed to extend beyond their clear import.

If a stranger will take a pledge of goods from a factor without inquiry, the consignor is not to suffer. Whether he knows or not that the person from whom he takes the pledge is a mere factor does not change the rule. A consignor's property cannot be taken from him without his consent. A pledgee is bound, at his peril, to inform himself of the facts. The rule as to *sales* in the ordinary course of business is one thing, and as to *pledges* entirely different. This is fully stated in the case of *Shaw* v. *Railroad Company*, *supra*. The difficulty, as heretofore intimated, arises from the failure of defendant to aver the amount of advances and charges for which the goods were pledged. The answer states that there were advances and charges, and that, for the purpose of raising means to pay the same, the warehouse receipts were pledged, and that defendant loaned "on the faith thereof" $10,555.31. If it be meant that the sum loaned was the amount of charges and advances, the defense is good, in the absence of a tender thereof; but if, on the other hand, it is meant that inasmuch as there was some amount due, however small, the factor could pledge the property for any loan he might obtain thereon, however large, and hold the property against the consignor generally, that special defense would be bad.

The only difference between the two special defenses seems to be that in one it is averred that the defendant believed the pledgor to be the owner, and in the other no such averment is made. As already stated, such a difference avails nothing. The defendant, in his argument, says: "The question presented for the consideration of the court is this: If a factor pledges the bill of lading or warehouse receipt, having no reason to doubt that such factor is the true owner of the goods, can the consignor recover the goods without first offering to return the money borrowed?" It will be apparent, from what has heretofore been observed, that the proper answer to such

question, thus broadly stated, would be in the affirmative. The factor cannot pledge the goods of his principal, except to the amount and in the manner stated. He has no authority, either by common law or by statute, to borrow money generally on the pledge of the warehouse receipt; nor can the pledgee protect himself against the demand of the consignor, except to the extent of such advances and charges. The pledgee may receive a transfer of the factor's lien, and nothing more. Hence, the answer being that advances and charges were due (the amount not stated), and that a loan was made to the factor, irrespective of the amount of said advances and charges, nothing definite is presented, unless, as stated in argument, that there was a valid pledge for the amount loaned on the faith of the receipt. Such a defense is not valid, and the demurrer thereto will be sustained.

The same ruling will be had as to the second special defense. If, however, the defense, if amended, should show that defendant was pledgee for advances and charges within the terms of the Missouri statutes, and that no payment or tender thereof was made before suit brought, then said defense as to this form of action will be valid. In other words, a pledgee can maintain his pledge only for what the statute provides, and in the manner provided. If he brings himself within the terms of the statute, then as lienor he is not a tort-feasor, or guilty of conversion by refusing to surrender the property until the lien is discharged.

Demurrer sustained.

WESTPHAL and others *v.* LUDLOW.

(District of Minnesota. March, 1881.)

1. PROMISSORY NOTE — COLLATERAL SECURITY — NOTICE OF DISHONOR. The strict rules of law relative to the presentation and notice of the dishonor of promissory notes do not prevail when such notes are held as collateral security for a precedent debt.

2. SAME — ORIGINAL DEBT.— The failure to present and protest a note taken as collateral security will not defeat a recovery of the original debt, where the amount of the note was not lost through the negligence of the creditor.

This action was tried before the court without a jury.

The plaintiffs are citizens and residents of the state of Iowa, and the defendant is a citizen and resident of the state of Minnesota.

In the year 1878, and previous to the month of September, the defendant was indebted to the plaintiffs for goods sold, and on the eighteenth of that month he inclosed in a letter to them a note of C. St. John Cole for $325, dated November 14, 1877, payable to defendant's order twelve months from date, and indorsed by him, proposing that they accept the note as payment on his account, the interest being computed to that date. Plaintiffs answered, declining the proposition, on September 11, 1878, but saying they would take it for collection, "applying the proceeds on your [his] account if collected at maturity." Not receiving a reply, plaintiffs, on September 21st, wrote, inquiring whether they should return the note or "send it for collection, applying proceeds on your [defendant's] account."

The defendant replied September 27th, according to the plaintiffs' suggestion, requesting them to collect it, and stating that "the maker would pay it at the Worthington Bank; then you [plaintiffs] can credit me with all you get."

The plaintiffs sent the note to the Worthington Bank, and on November 22d, after its maturity, wrote the bank: "Mr. C. St. John Cole's note is now past due. What does he say about it? and what are the prospects of its being paid?" The bank answered November 25th: "C. St. John Cole's note (No. 1386) is still unpaid. We think he can pay something on it in ten days. Shall we keep it or return it?" November 27th the plaintiffs instructed the bank to keep it ten days. On December 6th the bank returned the note, informing the plaintiffs that Cole was closed up by levy on goods that day. On December 9th plaintiffs returned the note to the defendant, and he through an attorney sent the note back, stating

"that the same had been lost and become worthless through your [plaintiffs'] negligence."

Defendant was informed, November 27 or 29, 1878, that the note was unpaid and in bank, and did not write the plaintiffs or take immediate steps to obtain possession of it; but, on the contrary, wrote them November 29th that "Cole is behind some, but is taking everything in rotation, and says he will get to that note, he thinks, the last of next week."

Cole confessed judgments and the sheriff took possession of his stock, valued at $2,200, December 6th, which embraced all of his visible property. This amount was not enough to pay all of his indebtedness. The evidence is that on November 17th, when this note matured, Cole was in no better financial condition.

Rogers & Rogers, for plaintiffs.

Chas. D. Kerr, for defendant.

NELSON, *District Judge*.— The plaintiffs are not held to the strict rules in regard to the presentment at maturity of the note taken as collateral security, and notice of non-payment to his debtor. The note was not received, although indorsed by the defendant, upon the condition that they would use such diligence. It does not represent the original debt, and to hold the defendant it is not necessary that the plaintiffs should regularly proceed to have the note presented and protested. It was not a satisfaction and extinguishment of the original debt, and a failure to give notice of non-payment will not necessarily defeat a recovery. If, however, by the neglect and laches of the plaintiffs the defendant was injured and the amount of the note lost, he may plead such negligence as a defense, for in such case the plaintiffs would be bound, as trustees or agents, to see that the defendant did not suffer loss on their account.

Was the note lost through the plaintiffs' negligence? Defendant urges that the insolvency of the maker occurred after

its maturity, and if he had been informed of its non-payment he could have secured himself. The evidence, as interpreted by me, does not prove that the insolvency of the maker occurred after the note matured.

The maker, in his testimony, says his financial condition at the maturity of the note was the same as December 5th, when several judgments were confessed by him in favor of other creditors, and there is no evidence to the contrary. He certainly had not sufficient property to pay his debts, and thus, I think was insolvent at the maturity of the note. Judge Washington, in *Gallagher's Ex'rs* v. *Roberts*, 2 Wash. 191, says Buller lays down the true rule in his Nisi Prius (ed. 1806), p. 182: "If a note is indorsed for a precedent debt, and a receipt was given as for so much money when the note shall be paid, and the creditor neglects to apply to the maker in time, and by his laches the note is lost, the precedent debt is extinguished;" but if it is kept without demand and insolvency takes place, the creditor who receives it must lose. See also 2 How. (U. S.) 457. This doctrine determines this case. The note taken as collateral security matured November 17, 1878. The defendant knew it was unpaid November 29th, when he quieted the plaintiffs by writing them that Cole would pay it soon.

There is no direct evidence of a demand made for payment at maturity, and if it is conceded that he was not applied to in time, there is not in addition laches which damaged the defendant. Cole was insolvent, in fact, when the note matured, and the ordinary mode of legal proceedings would not save the debt. There is no evidence to show that a writ of attachment could have been obtained, and even the defendant, who lived near Cole, says that he was not aware of his insolvency at that time, and doubted it as late as December, when the levies were made.

Judgment will be entered for the plaintiffs for the amount claimed.

HAMILTON and others *v.* CHOUTEAU and others.

(Eastern District of Missouri. January, 1881.)

1. FEDERAL JURISDICTION — INSOLVENT LIFE INSURANCE COMPANY — RECEIVER OF STATE COURT — POLICY-HOLDERS — STOCKHOLDERS — FRAUD.— Suit was instituted in a federal court by the policy-holders of an insolvent life insurance company against its stockholders for the fraudulent appropriation of a part of the assets of the company. *Held*, that such court could not assume jurisdiction when the company was in the hands of a receiver of a state court, who was proceeding to collect and administer the assets for the benefit of all the creditors.

In equity. Demurrer.

This was a bill filed by the policy-holders of the St. Louis Mutual Life Insurance Company for relief against its stockholders. The company, a Missouri corporation, was chartered on the mutual plan, with stock of the par value of $100,000, of which defendants were the owners. Proceedings were commenced in the state court by the insurance commissioner to wind up the company, after which, on the thirteenth day of December, 1873, its directors, by the sanction of the commissioner and decree of the court, conveyed and delivered the assets of said company to the Mound City Life Insurance Company, a Missouri corporation, in consideration of a covenant on its part that it would reinsure all outstanding risks and pay all liabilities of said St. Louis Mutual Life Insurance Company; and likewise redeem and take up said stock by delivering a like amount of its own stock to the owners, with a right on their part, at any time within one year from the date of said contract of reinsurance, to return said new stock to the Mound City, and receive from it the par value; all of which is alleged to have been done by the defendants, and that defendants received from the Mound City the par value of their stock, which was paid to them out of the assets received of the St. Louis Mutual Life Insurance Company under this contract of reinsurance. The Mound City Life Insurance Company became insolvent, and was unable to keep

its agreements of reinsurance, in consequence of which both companies have been declared insolvent by proceedings in the state court, and are now in the hands of their respective receivers, and being wound up under the Missouri law. It is further alleged that the contract of reinsurance was fraudulent and void, and that the money of the St. Louis Mutual Life Insurance Company in the hands of the Mound City was charged with a trust in favor of the plaintiffs, and that the defendants fraudulently agreed to this arrangement so as to be able to realize par for their stock, which was worthless, and should in equity account to plaintiffs for the amount received from the Mound City.

Robert Crawford, for plaintiffs.

Cline, Jamison & Day, for defendants.

TREAT, *District Judge.*—The demurrer in this case is both general and special. By the terms of the bill it appears that the various insurance companies named are in the hands of receivers duly appointed by a state court of competent jurisdiction, and that their affairs are in the course of judicial administration. If the allegations of the bill are true, as confessed by demurrer, said receivers are the proper parties to receive whatever may be due by defendants, so that the same may be distributed *pro rata* among the creditors. Undoubtedly, if such a fraudulent scheme existed, as is charged, whereby the parties defendant, for their own private gain, caused the plaintiff and other policy-holders to be defrauded of their lawful demands, said defendants should, in a proper proceeding, be compelled to refund for the common benefit. It must be observed, however, that the bill, even in that view, is fatally defective, except on one hypothesis, imperfectly presented. The defendants, it is charged, were respectively stockholders in the St. Louis Mutual Life Insurance Company. Each held a different number of shares. It nowhere appears that said stock was not fully paid up, and consequently that

the stockholders were liable for the debts of the company. It is alleged, however, that all the assets of said company were, with their connivance, etc., transferred to the Mound City Company, of whose shares of stock they were to receive a like number to those held in the St. Louis Mutual, subject to be paid off at par by the Mound City; that those shares were so paid off, and the defendants became the respective beneficiaries thereof; and that the only and main source of payment was from the St. Louis Mutual. Practically, the insolvent St. Louis Mutual, through the fraud charged, secured to these conniving stockholders full pay at par for their worthless stock out of the assets which should have been devoted to the payment of its debts.

It is not doubted that under sufficient averments in a proper state of such a case equity would lay its hands upon funds thus fraudulently acquired, and apply them for the benefit of honest creditors. But it is averred that the St. Louis Mutual is now, and has been for years, in the hands of a competent receiver, who is proceeding to collect and administer its assets for the benefit of all creditors. Why then should this court (the receiver being no party) undertake to collect and administer a fragment of the assets? Will a chancery court split assets and demands to the extent of upholding as many suits as there may be creditors or items of assets? Instead of avoiding thereby it would indefinitely create a multiplicity of suits. If this court took charge of this suit it would be compelled to bring in all the parties and take custody of the assets in order that each creditor might receive his *pro rata;* for equality is equity.

The grave question as to jurisdiction remains with reference to the citizenship of the parties. This subject has been considered in several cases this term, and all that need be added now is that the bill is fatally defective.

The demurrer is sustained.

Singer Manufacturing Company *v.* Stanage.

(Eastern District of Missouri. March, 1881.)

1. Trade-Mark — Patented Article — Specific Designation.— Where a word indicates a patented machine of peculiar mechanism, such word cannot be protected as a trade-mark upon the expiration of the patent.
2. Same — "Singer" Machine.— Certain patented sewing machines were known as the "Singer" machines. *Held*, that the word "Singer" was not a trade-mark, and became common property upon the expiration of the patent.

In equity.

Taylor & Pollard, for plaintiff.

Marshall & Barclay, for defendant.

Treat, *District Judge.*— This is a suit for an alleged violation of plaintiff's trade-mark. It seems that the plaintiff has pursued its controversy on both sides of the Atlantic, generally with success. The decisions of the foreign and American courts have been cited and examined. While reference is made in many of them to actual or supposed patents, issued and expired, no one of said cases, except that by Judge Drummond, states with directness what should be the turning point in the controversy. The case of the plaintiff against Wilson (3 Appeal Cases, 376) turned more on questions of practice than on the rules by which the rights of the parties were to be ultimately determined. That case and others in England, and the great number of cases in American courts (notably *Manuf'g Co.* v. *Trainer*, 101 U. S. 51), ought to make clear the rules controlling this litigation. It would be tedious and unprofitable to review the many authorities cited. In the case from the English house of lords *(supra)*, and in the case *(supra)* from the United States supreme court, there were differing opinions on the merits. Each of the many cases cited has its distinctive peculiarities, and, while all courts

agree that property interests in trade-marks should be protected, there is a strange diversity of reasoning as to the true basis on which such interests should rest.

It is not necessary for the solution of the rights of parties litigant in this suit to enter upon so wide a field of analysis or discussion. At the opening of the argument this court directed the attention of counsel to what seemed to be a matter of large moment, but as the pleadings and evidence had been prepared in the light of leading English and American cases, the cause progressed at great length, calling for the remark that despite these cases a large amount of irrelevant testimony was presented; or, rather, that while counsel had been diligent in their preparation, not knowing what views this court might entertain, much of the evidence seemed to apply rather to infringements of patents than a violation of trade-marks. Still, many of the leading cases have taken that course, to what seems to be a confusion of rights.

This case furnishes an apt illustration. The plaintiff and its predecessors had, in connection with others, through patents, a monopoly as to certain sewing machines, known as the "Singer" machines. When these patents expired every one had an equal right to make and vend such machines. If the patentees or their assignees could assert successfully an exclusive right to the name "Singer" as a trade-mark, they would practically extend the patent indefinitely. The peculiar machine which had become known to the public under that name during the life of the patents was so known as a specified article of manufacture, and at the expiration of the patent would still be known on the market by that designation, irrespective of the name of the special manufacturer. No one had an exclusive right to the use of the generic name. If one wished to acquire a trade-mark in connection therewith he could do so distinctively. The plaintiff accordingly adopted specific devices, including its own name, whereby its products could be distinguished. The defendant adopted a different device, with the name of his manufacturer "Stewart," and

advertised the sale sometimes of the "Stewart" machines and sometimes of the "Stewart-Singer" machines, attaching his name as "late general manager of the Singer Manufacturing Co."

It is contended that, although he and others had an indubitable right to manufacture and sell the "Singer" machines — that is, machines known as such in the market — so far as their mechanism is concerned, they had no right to advertise or sell them by their right names, with or without a prefix. How is it that the plaintiff corporation acquired a monopoly of the *name*, whereby it could exclude, after the expiration of the patent, all others from making or vending the machines under the only name known to the public?

A review of the many cases cited leads to the following conclusions:

First. That when a patented article is known in the market by any specific designation, whether of the name of the patentee or otherwise, every person, at the expiration of the patent, has a right to manufacture and vend the same under the designation thereof by which it was known to the public.

Second. That the original patentee or his assignees have no right to the exclusive use of said designation as a trade-mark. Their rights were under the patent and expired with it.

Third. If a corporation or person wished to establish a trade-mark or name, indicative of its own special manufacture of such a machine or product, the right must grow up, just as all other rights of the kind are established — by use and acquiescence. Thus, as every one at the expiration of the patent had a clear right to manufacture and vend what was known as the "Singer" sewing machine, the plaintiff could acquire no exclusive right to the name "Singer," but could by proper trade-mark appropriate to itself names or devices indicating its own manufacture of such machines.

Fourth. The plaintiff did adopt special names and devices to indicate what it put on the market as its manufacture, viz., "The Singer Manufacturing Company," imprinted on the

shield and arm of the machine, etc. The defendant placed on its shield and arm the words, "The Henry Stewart's Manufacturing Co.," with another device. Now, as each corporation had an equal right to make and vend that class of machines known in the market as "Singer" machines, and as the defendant used neither the name nor device of the plaintiff, there is no violation of the plaintiff's trade-mark or name. While the courts are prompt to protect the property rights of any skilled person in his trade-mark or name, whereby he may have in the market the benefit of his skill and reputation, they must also guard against every effort to secure a monopoly not arising therefrom. When a marketable product is publicly known or designated by a generic name, no one should be permitted to shut out all just competition by claiming the exclusive right to use that name. If there is a peculiar excellence, real or supposed, in his manufacture, he can establish by his trade-mark or name the right to protection against the piracy thereof; but he cannot go further and insist that, independent of his personal skill or manufacture, he can cover by his trade-mark or name whatever may properly distinguish the common article which every one has a right to make or vend.

Fifth. Inasmuch as the word "Singer" indicates a machine of peculiar mechanism, and every one has a right to make such a machine, the word "Singer" attached to such machines is common property.

Sixth. The distinctive names and devices of the plaintiff corporation were not used by the defendant, and no one of ordinary intelligence could suppose that the "Stewart" manufacture was the manufacture of the plaintiff. Each had its distinctive and detailed names and devices, so that there was no probability that the machine made by one would be mistaken for the manufacture of the other.

These views dispose of the case; yet it is important to remark that the plaintiff is seeking, after the expiration of one or more patents, to perpetuate a monopoly under the guise of a trade-mark. The propositions involved have undergone so

much judicial investigation in transatlantic and cisatlantic courts that a summary disposal of the question may seem inadequate to the exigency of the case; yet each of said cases would show, if properly analyzed, that the general rule is admitted by all.

There are many technical objections interposed with respect to evidence offered; yet, giving the objector the largest benefit therefrom, there still remains the clear fact that the plaintiff, even if its assignment covered the name as a trade-mark (which is very doubtful), is seeking to create a monopoly for the practical extension of a patent beyond its legal term. The plaintiff has established no such right, nor has the defendant consequently violated any of plaintiff's rights.

The bill will therefore be dismissed at plaintiff's costs.

CITY OF ST. LOUIS *v.* THE KNAPP, STOUT & CO. COMPANY.

(Eastern District of Missouri. ——, 1881.)

1. INJUNCTION — NUISANCE — NAVIGABLE RIVER.— A court of equity will not enjoin the erection of a runway for logs, upon the ground that it will divert the course of a navigable river, unless it appears that the threatened structure will be a nuisance *per se*.
2. NUISANCE — RIVER.— A structure in the channel of a river will not necessarily be held subject to abatement as a nuisance. *Pennsylvania* v. *Wheeling Bridge Co.* 13 How. 518.
3. INJUNCTION — NUISANCE — PARTY TO BILL.— It seems to be well settled that a bill in equity to enjoin or abate a public nuisance must be filed by one who has sustained, or is in danger of sustaining, special damages.

On demurrer to bill.

Leverett Bell, for plaintiff.

George M. Stewart and *C. H. Krum*, for defendant.

MCCRARY, *Circuit Judge.*— The bill avers that the eastern boundary of the city of St. Louis is and always has been the middle of the main channel of the Mississippi river, and that

complainant is the proprietor of the bed of the river within the city limits, and that by its charter the complainant is authorized to construct all needful improvements in the harbor, to control, guide or deflect the current of the river, and to erect, repair and regulate public wharves and docks; that by proper ordinance the lines of the wharf have been laid down and established upon a certain piece of real estate in the northern part of the city, particularly described in the bill.

It is further averred that defendant is erecting a saw-mill on its property, and that, for the purpose of hauling logs from the river into its mill, the defendant is erecting a runway for logs, which will extend some hundred feet from the western edge of the water of the river, and is driving piles, as a foundation for the runway, into the bed of the river, east of the eastern line of the wharf as established by the city under the ordinance aforesaid; that north and south of the defendant's premises portions of the wharf have been completed, and are being used as landings for boats running on the river; that the effect of driving the piles in the bed of the river and constructing the runway as aforesaid will be to divert the navigable water of the Mississippi river from its natural course, and to throw it east of its natural location, and from along the river bank north and south of said runway and piling.

It is further averred that the construction of said runway will create in front of and upon plaintiff's improved wharf, as aforesaid, a deposit of mud and sediment, so that it will be impossible for boats and vessls engaged in the navigation of the Mississippi river to land at the improved wharf aforesaid, north and south of the defendant's said premises.

The prayer of the bill is that defendant, its agents and servants, be forever enjoined from driving piles and constructing its runway east of the western water's edge, in front of defendant's premises; and that it be ordered to remove such piles as it has already driven there, and all portion of said runway already constructed there by it; and that the plaintiff

have such other and further relief in the premises as it may be entitled to, etc.

The respondents demur to the bill, and by their demurrer they raise the following questions: *First*, whether the bill, upon its face, shows that the construction of the runway in question will intrude upon plaintiff's rights, and cause special damage; *second*, whether, upon the allegations contained in the bill, complainant is entitled to decree in advance of the construction of the runway, and to prevent its completion.

It will not be necessary, upon the consideration of this demurrer, to finally decide the first question presented. It seems, however, to be well settled that a bill in equity, to enjoin or abate a public nuisance, must be filed by one who has sustained or is in danger of sustaining special damages. It is true that one of many persons, all of whom have been damaged by a public nuisance, may bring a bill in behalf of himself and all others who are in like situation, who are or may be injured; and it is by no means necessary to join in such suit all persons who have sustained injury; but it is clearly necessary that the complainant should show that he has sustained or is in danger of sustaining individual damage. It is, to say the least, doubtful whether the bill in this case brings the complainant within this rule. *M. & M. R. Co.* v. *Ward*, 2 Black, 485; *Irwin* v. *Dixon*, 9 How. 10.

Upon the second question there is less room for doubt. The respondents are proceeded against to prevent a construction which, it is averred, will be a nuisance if completed. The structure complained of has not been built, but is in the course of construction. The bill avers that, if constructed, it will be an obstruction to navigation, and will result in damage to the complainant. Courts of equity rarely interfere by injunction against threatened nuisances. To justify such interference the case must be clear; that is to say, it must appear that the threatened structure will, if erected, be a nuisance *per se*. If it may or may not become so, a court of equity will not inter-

pose in advance to prevent its erection, especially in a case like the present, where it appears that the structure complained of is about to be erected in the river by a riparian proprietor, who has an undoubted legal right to place it and maintain it there, if his doing so does not interfere with navigation, or damage others. Where it can be said that it is uncertain whether the structure, if erected, would be an obstruction to navigation, or injurious to complainant's rights, equity will not interfere. High on Injunctions, § 488.

It is true that the bill alleges in general terms that the effect of driving the piles in the bed of the river, and constructing the runway as proposed by respondent, will be to divert the navigable water of the river from its natural course, and also to cause the deposit of mud and sediment, so as to prevent boats from approaching it, or landing at the improved wharf provided by complainant. But this is only the expression of an opinion or apprehension on the part of the complainant. The runway, when constructed, may not produce the results apprehended, and it seems to be well settled that it is not enough for the complainant to allege that particular consequences will follow the erection of the structure complained of. Such facts must be stated as will enable the court to say and determine whether the allegation is well founded. *Adams* v. *Michael*, 38 Md. 123.

It is very clear that a public navigable stream must remain free and unobstructed, and that no private individual has the right to place any permanent structure within the navigable channel. *Atlee* v. *The Pkt. Co.* 21 Wall. 389; *State of Pennsylvania* v. *Wheeling Bridge Co.* 13 How. 518.

If the respondent proceeds to construct the runway as proposed, it does so at its own risk, and must understand that, when the same is completed, if it proves to be an obstruction to the free navigation of the Mississippi river, or a special injury to the rights of others, it may be condemned and removed as a nuisance. But it is not every structure in the channel of a river that will be held to be subject to abatement

as a nuisance. In the *Wheeling Bridge Case, supra*, a bridge across the Ohio river, constructed without authority from congress, though held to be a nuisance as originally constructed, was allowed by the supreme court to remain, upon the condition that there should be constructed a suitable and practicable draw, so as to afford reasonable facilities for the passage of vessels.

My conclusion in this case is that an injunction cannot be granted upon the allegations of the bill, and that the demurrer thereto must be sustained. The right to proceed against the respondent for erecting a nuisance within the navigable channel of the river will remain to any person or persons having a right to institute such proceedings, in the event that the structure, when completed, shall prove to be a nuisance.

HAMMERGREN *v.* SCHURMEIER and others.

(District of Minnesota. June, 1881.)

1. CONTRIBUTORY NEGLIGENCE.—Certain evidence set out in the opinion *held* to show contributory negligence on the part of the plaintiff and preclude recovery for injuries received by the fall of an elevator.

Motion of plaintiff for a new trial.

Tilden R. Selmes, for the motion.

Gordon E. Cole, contra.

NELSON, *District Judge.*—I have again carefully examined the evidence, and must deny the motion made by plaintiff's counsel. The plaintiff had been in the employ of the defendants for nearly a year previous to the accident, and had often operated the elevator in the mill. He was at work in the packing room of the mill, upon the last floor to which the elevator descended, and was injured by the sudden descent of the elevator, while he was sweeping the floor just under the opening

through which the elevator operated. The defendants were using it, and in progress of ascending when it fell, and one of them had leaped to a floor above as the elevator was passing, and the other came down with it to the room it had started from.

The elevator was attached by a steel rope to a drum on a revolving shaft in the upper story of the mill, and could be started or stopped by throwing the belts from loose to fixed pulleys or from fixed to loose pulleys on the shaft. An iron rod attached to the machinery, and running down near one of the posts on which the elevator moved up and down, was used to throw off and on the pulleys the belt which gave motion to the revolving shaft. The steel rope, which was attached to the elevator and drum, was longer than necessary to allow the elevator to go down to the lowest floor by several feet, and this surplus was coiled around the drum. There was an adjustable cam or set screw on the moving part of the elevator, and a collar on the iron rod in the lowest room, where plaintiff worked; and if the cam was screwed up tight when the elevator came down, it would hit the collar and operate the iron rod and throw the belt off the fixed pulleys and stop the machinery; but if the cam was not screwed up tight and adjusted so that the rope was taut when the machinery stopped, the drum would revolve and the rope unwind so as to become slack.

The plaintiff had frequently used the elevator and knew how to stop and start it, and knew that the cam required to be adjusted when the defendants started to go up, and that the rope was more slack than usual. He neither adjusted the cam so as to take up the slack and make the rope taut, nor informed the defendants when they went on the elevator to ascend that the rope was slack. The negligence of the defendants can be attributed only to the fact that they went upon the elevator and proceeded to operate it when the rope was slack; but the plaintiff, in proving this conduct of the defendants, also proves that, with knowledge that this rope was slack, he

did not adjust it, although a wrench was in the room with which it could be done, and did not notify the defendants, but immediately as the elevator ascended went under it to sweep and was injured. This was negligence on the part of the plaintiff; and one who, by his negligence, has brought injury upon himself, cannot recover damages for it.

Motion denied.

PALMER *v.* CALL.

(District of Iowa. ——, 1881.)

1. USURY — AGENCY. — If an agent, in good faith, makes a loan for another and without the knowledge or authority of his principal, and for the agent's own benefit exacts more than legal interest, the loan is not thereby rendered usurious.
2. SAME — RENEWAL — BONA FIDE ASSIGNEE. — Where an usurious obligation is passed for value to an innocent purchaser without notice of the usury, who afterwards takes a new and substitute security for the debt, there being no taint of usury in the second transaction, the plea of usury to the substituted obligation cannot be sustained.
3. CASE STATED. — A. placed $10,000 in B.'s hands to loan. B. made the loan to the defendant, giving him $8,000, retaining $2,000 as commission, and receiving in his own name defendant's note for $10,000, with semi-annual interest notes of $500 each. B. retained custody of the notes, but recognized them as the property of A., who received the interest, but knew nothing of the usury, and gave B. no authority to retain any bonus out of the sum loaned, or take more than legal interest therefor. The plaintiff purchased the notes in good faith at their face value without knowledge of the usury in the original loan, and afterwards, through B. & Co., made a new contract with the defendant by which he advanced him $1,000, surrendered the note and received from him the note now in suit for $11,000. Plaintiff did not know that B. & Co. retained $500 of the $1,000 he advanced as commission for procuring the reloan. The defense of usury being set up in suit to foreclose the mortgage given to secure the note, *held* —

   (1) That as neither A. nor the plaintiff had any knowledge of the usury, and derived no benefit from it, the plea of usury must be overruled.

   (2) That A. was to be regarded as the lender of the money, although B. failed to disclose his principal and took the notes in his own name.

   (3) That plaintiff could still recover though B. be regarded as the lender since the substitution of the new security purged the loan of the taint of usury in his hands as an innocent assignee.

   (4) That the statutes of Iowa relative to usury have not modified the foregoing rules of law.

In equity.

This is a suit to foreclose a mortgage. The only defense is usury. The note secured by the mortgage was for the sum of $11,000, executed by the defendant to the complainant at Emmetsburgh, Iowa, on the first day of November, 1875, payable with interest at ten per cent. semi-annually, on the eighteenth day of November, 1880, with a stipulation that if default should be made in the payment of interest, the whole should, at the election of the holder, become due, etc. It appears that Mrs. Maggie P. Davison, of Cook county, Illinois, placed in the hands of one A. C. Burnham, also living in that state, the sum of $10,000, authorizing him to loan the same for her on real estate security. Said Burnham was a member of the firm of Burnham, Ormsby & Co., bankers, of Emmetsburgh, Iowa. Asa C. Call, the defendant, had applied to that firm to obtain a loan for him. Shortly after the application was made, Call met A. C. Burnham in Iowa, and they entered upon a negotiation for the loan. The result was that Call gave his note to Burnham for $10,000, with semi-annual interest notes of $500 each, and received through the house of Burnham, Ormsby & Co. the sum of $8,000, that firm retaining $2,000 as commissions out of the $10,000. The money loaned belonged to Mrs. Davison, but that fact was not disclosed to Mr. Call, and the notes were taken in the name of A. C. Burnham. The notes remained in the custody of A. C. Burnham, subject to the control of Mrs. Davison, and were recognized by Burnham as her property. She received the interest, and was wholly ignorant of the fact that Mr. Call received any less sum than $10,000. She gave no authority to Burnham to loan the money at a greater rate of interest than ten per cent. per annum, or to take any bonus out of the sum loaned. She received no benefit from the usury, and had no knowledge whatever of it.

The plaintiff, Henry H. Palmer, a capitalist residing in New Jersey, purchased the said $10,000 note, with five coupon notes attached, from A. C. Burnham, who indorsed it to him

in September, 1873, paying for the same the full face value of $10,000 in cash. The interest had been paid at maturity up to the time of the purchase, and the plaintiff had no notice of the usury in the original loan on which the notes were given. The plaintiff did all the business in connection with the notes and mortgage through the house of Burnham, Ormsby & Co. He never saw the defendant, nor did any business with him in person. The plaintiff placed the notes in the hands of Burnham, Ormsby & Co. for collection of interest and reloan to Mr. Call. The interest notes were paid at maturity to the plaintiff until November, 1875, when one of the coupon notes for $500 being due, the defendant, at the instance and request of Burnham, Ormsby & Co., entered into a new contract for the extension of the loan, by which he gave the plaintiff the said note for $11,000. The plaintiff advanced and paid the sum of $1,000 in cash, and surrendered the $10,000 note to the defendant. It seems that Burnham, Ormsby & Co. applied $500 of the cash payment to the payment of the coupon note then due, and, without knowledge of the plaintiff, retained $500 as a bonus for effecting the new loan. The plaintiff did not authorize the retention of the $500 bonus by Burnham, Ormsby & Co., received no benefit from it, and, in fact, had no notice of it when he received the $11,000 note and mortgage.

O'Connel & Springer and *Crawford & Soper*, for plaintiff.

George E. Clark, Hubbard & Clarke and *Wright, Gatch & Wright*, for defendant.

LOVE, *District Judge.*— It is well settled that to make a loan usurious there must be an intent on the part of the lender to take more than the legal rate of interest. Tyler on Usury, 103; *Condit* v. *Baldwin*, 21 N. Y. 219; *Loyd* v. *Scott*, 4 Pet. 205; *U. S. Bank* v. *Waggener*, 9 Pet. 309; *Jones* v. *Berryhill*, 25 Iowa, 289.

Doubtless, in general, the intent of an agent acting within

the scope of his authority may be imputed to the principal. But it is settled beyond question that if any agent in good faith makes a loan for another, and without the knowledge or authority of his principal, and for the agent's own benefit exacts more than legal interest, the loan is not thereby rendered usurious. In such case the law does not impute the knowledge and the intent of the agent to the principal. This doctrine is supported by numerous authorities both in England and this country. Tyler on Usury, 156–172; *Dagnel* v. *Wigley*, 11 East, 43; *Solartee* v. *Melville*, 7 Barn. & Cress. 427; *Coster* v. *Dilworth*, 8 Cow. 299; *Condit* v. *Baldwin*, 21 N. Y. 219; *Smith* v. *Marvin*, 27 N. Y. 137; *Bell* v. *Day*, 32 N. Y. 165; *Baxter* v. *Buck*, 10 Vt. 548; *Muir* v. *Newark Ins. Co.* 16 N. J. Eq. 537; *Canover* v. *Van Mater*, 18 N. J. Eq. 486; *Rogers* v. *Buckingham*, 33 Conn. 81; *Hopkins* v. *Baker*, 2 P. H. (Va.) 110; *Gokey* v. *Knapp*, 44 Iowa, 32; *Myllis* v. *Ault*, 45 Iowa, 46; the result summed up in 17 Alb. Law Jour. 116; *Barret* v. *Snowden*, 5 Wend. 181.

I have the greatest confidence in the correctness and stability of this rule, from the fact that it rests upon solid foundations of reason and justice. The lender employs an agent to loan his money. He gives the agent no authority to violate the law. He has no knowledge of the fact that usurious interest is extorted. He has no intent to receive, and does not receive more than the law allows. He derives no benefit from the illegal transaction. But the agent and borrower, without the knowledge, consent or authority of the lender, enters into an illegal contract for the payment of excessive interest. The borrower and agent are guilty parties. They knowingly violate the law. They are *particeps criminis*, though it may be in unequal degrees. They knowingly put the lender's money in jeopardy without the least pecuniary advantage to him. It is the lender who is prejudiced and injured by such a transaction. Would it not be most unjust to inflict the pecuniary loss upon the lender, who is without fault and free from any illegal intention, in favor of a party who has knowingly and

willfully participated in the violation of the law? Would it be consistent with sound morality so to do? What right has the borrower to assume or to believe that the lender's agent is authorized by his principal to violate the law by the taking of usurious interest? The lender's agent is either a special or a general agent. If he is specially empowered to negotiate the particular loan and no other, it is the legal duty of the borrower to look to the special authority, and the principal is not bound beyond the special authority. If he is a general loan agent, the limitation is that he must keep within the usual and ordinary scope of the business committed to him. The borrower must determine the extent of the authority by considering what is the usual and ordinary course of that business. Is it within the usual and ordinary course for an agent to take excessive interest in violation of the law? Such a practice is *extraordinary*. It is *without* the usual course of business. The natural and proper inference for the borrower to draw from the fact of the agent's proposing to take illegal interest would be that in so doing he would be acting without the authority of his principal. It may be said that the principal is responsible for the frauds of his agent in the course of the business committed to him, even though the principal should be ignorant of the fraudulent acts or should expressly prohibit them. Very true; but in this case there are two innocent parties — the principal and the party defrauded. One of the two must needs suffer from the fraudulent acts of the agent; and it is the dictate of reason and justice that where one or the other of these innocent parties must suffer, the loss should fall upon him who put it in the power of the agent to commit the fraud, rather than him who had no lot nor part in choosing the agent, or placing him in a position to do the mischief. But in the case of usury contracted for through an agent the borrower is not innocent. He participates knowingly in the violation of the law. He has no merit to plead in his defense; while the lender, in the absence of authority given by him, or knowledge of the violation of the law, is

wholly innocent and entirely free from moral guilt. Indeed, it smacks strongly of fraud in the borrower to enter into a contract with the lender's agent to pay usurious interest, without any inquiry whatever into the authority of the agent to make an unlawful contract, which the borrower knows cannot be enforced; for in this way the borrower, in connivance with the agent, gets the lender's money with the intent, demonstrated by his subsequent plea of usury, to avoid the fulfillment of his contract. Now if the principle thus stated, which is so just in itself and so firmly supported by authority, be sound law, it is decisive of the present case; for it is evident that neither Mrs. Davison nor the plaintiff had any knowledge whatever of the retention by Burnham, Ormsby & Co. of the respective bonuses of $2,000 and $500. They did not authorize the usury. They received no benefit from it. They paid the full sums for which they respectively received the defendant's notes. If, therefore, it be granted as a fact that A. C. Burnham was Mrs. Davison's agent in making the original loan, and that Burnham, Ormsby & Co. were the plaintiff's agents in negotiating the second loan, it would make no difference in the decision of the question in this case. The plea of usury must still be overruled. I cannot assent to the proposition of defendant's counsel that in the original transaction A. C. Burnham was the lender of the money, because he failed to disclose his principal and took the notes in his own name. The money belonged to Mrs. Davison. A. C. Burnham was her agent in making the loan of it. They both treated the notes as the property of Mrs. Davison, and she received the interest upon them. A. C. Burnham had in fact no real interest in the loan, except as trustee for Mrs. Davison. He would have lost nothing if a plea of usury had been sustained. The penalties would have fallen upon Mrs. Davison; and it is therefore her intentions and her acts, not the acts and intentions of A. C. Burnham, that are to be considered in determining whether or not the penalties of usury shall be inflicted.

The act of an agent in taking notes upon a loan of his principal's money in his own name does not make the agent the lender. But even if we grant the proposition that A. C. Burnham was in fact the lender, it will not avail the defendant in this case; for it is a legal proposition well settled in our jurisprudence by the most respectable authorities, that where an usurious obligation passed for value to an innocent purchaser without notice of the usury, and where the innocent assignee takes a new and substitute security for the debt, there being no taint of usury in the second transaction, the plea of usury to the substituted obligation cannot be sustained. So long as the usurious contract remains in the hands of the original party to it, no change in the form of the security will have any effect to purge it of the taint of usury; but where it has passed for value into the hands of an innocent assignee the rule is different. *Ellis* v. *Warner*, ———, 752; *Cuthbert* v. *Haley*, 8 Tenn. 890; *Powell* v. *Waters*, 8 Cow. 669; *Kent* v. *Walton*, 7 Wend. 257; *Dix* v. *Van Weyck*, 2 Hill (N. Y.), 522; *Smedburg* v. *Simpson*, 2 Sandf. 87; *Smedburg* v. *Whittlesey*, 3 Sandf. Ch. 323; *Smalleys* v. *Dougherty*, 3 Bosw. 66; *Houghton* v. *Payne*, 26 Conn. 396; *Brown* v. *Waters*, 2 Ch. Cas. 209; *Bearce* v. *Barston*, 9 Mass. 44; *Campbell* v. *McHarg*, 9 Iowa, 357; *Wendlebone* v. *Parks*, 18 Iowa, 544.

It is needless to say that the present case is clearly within this principle. The plaintiff was an innocent purchaser of the original notes for value. He not only took a new and substituted security, but the new obligation was founded upon additional considerations — the extension of time and the advance of a further sum of money. There was no usury in the second loan which could, as we have shown, affect him. The argument of counsel, that the true construction of sections 2079 and 2081 of the codes is repugnant to the principle that a new and substituted security in the hands of an innocent assignee avoids the usury, is to my mind plausible, but inconclusive. These provisions have not yet been construed as applicable to

such a security, and I think it is quite unnecessary so to construe them. The provision of section 2081 is that nothing in the statute shall be construed:

"To prevent the proper assignee in good faith and without notice of any usurious contract from recovering against the usurer the full amount of the consideration paid by him for such contract, less the amount of the principal money."

It seems to me that this provision was merely intended to give the assignee without notice a remedy where he had none before; that is, where he stood upon the original usurious contract without any new security. In most cases we may assume that the debtor would not execute to the innocent assignee a new security for the usurious debt, and in all such cases the innocent holder could recover from the debtor only the "principal money." The statute comes to his relief by giving him a right to recover against the usurer the full amount of the consideration paid by him for such contract, less the amount of the principal money. It is a wholly different case where the debtor himself gives to the innocent assignee, who pays full value and takes no usury, a new and substituted obligation, especially where such obligation is founded upon some new and sufficient consideration. In this case the assignee would have a sufficient remedy against the debtor upon the new contract by the principle of the common law to which I have adverted, and therefore the provision of the statute would be inapplicable to his case and unnecessary to his protection.

As to the words of the section relied upon by counsel to support the construction that "no person shall directly or indirectly receive in money, goods, or things in action, or in any other manner, any greater sum or value for the loan of money" than ten per cent., they are sufficiently answered by the fact that the innocent assignee does not receive more than ten per cent. on the sum by him advanced. If he does receive more, his new contract in its turn becomes usurious and subject to the penalties of the statute. It is my opinion that it was not the purpose of the legislature to make our statute of usury

apply at all to negotiable bills and notes in the hands of the *bona fide* holder. It would certainly be a most serious obstruction to the free circulation of commercial paper to subject it to the law of usury. Can it be that our legislature intended that every one in money transactions before receiving a bill or note under-due should stop to inquire whether or not it has upon it the taint of usury? I think not. It has long been the settled law that where a statute by its terms makes a note or bill absolutely void, the instrument is invalid in the hands of a *bona fide* holder for value. But where a statute declares a contract illegal, but only voidable, a negotiable note or bill founded upon such voidable contract is good in the hands of a *bona fide* holder. This doctrine has been applied by the courts to statutes of usury as well as other penal statutes. Now our statute does not make a usurious contract void; indeed, such a contract is only voidable as to the excess of interest. Did our legislature intend in this respect to overturn one of the great principles governing commercial paper in this and other countries? It is noticeable that the legislature does not, in the sections just referred to, use terms appropriate to commercial paper. The language is that the proper "assignee," not indorsee, shall be entitled to the remedy over against the usurer.

In strict legal parlance we do not use the term "assignee" when we mean to designate the indorsees of bills and notes. I am therefore inclined to think that the legislature, in using the term "assignee," did not mean to provide for innocent indorsees of mercantile paper who were already amply protected by the law merchant, but for that large class of assignees who, in the absence of such a provision, would step into the shoes of their assignors with just the same rights, remedies and equities to which their assignors are entitled, and none other.

Judgment for the complainant.

Des Moines & Minneapolis Railroad Co. *v.* Chicago & Northwestern Railroad Co.

(District of Iowa, C. D. January, 1881.)

1. General Solicitors — Institution of Suit — Authority.— The general solicitor of the plaintiff corporation, being an officer unknown to the articles of incorporation and the by-laws, has no authority to institute and prosecute suits without the sanction of the board of directors, and such sanction not appearing in this case, the suit was dismissed on motion.

Motion to dismiss.

McCrary, *Circuit Judge.*—These cases are before us on motions to dismiss upon the ground that the plaintiff has not authorized their institution, and because the president of the plaintiff has directed their dismissal. The suits were instituted by the general solicitor of the plaintiff corporation, without the authority of the board of directors. The president of said corporation has directed their dismissal. It is not necessary to consider whether the president of a corporation can, without the assent of the board of directors, dismiss a suit which has been instituted by proper authority in the name of such corporation. Much must depend, in all such cases, upon the provisions of the charter and by-laws of the corporation, and of the statutes by which it is governed. We have examined the articles of incorporation and the by-laws of the plaintiff, the Des Moines & Minneapolis Railroad Company, as well as the affidavits submitted to us, and we find nowhere any authority conferred upon the general solicitor of that company to institute a suit in its name. The office of a general solicitor is not mentioned in said articles or by-laws, and no evidence is offered tending to show that the board of directors ever took any action looking to the institution of these suits. In the absence of such action, and in view of the fact that the board has never ratified the action of the solicitor in instituting these suits, we are obliged to hold that they are here without the authority or consent

of the plaintiff. The general solicitor, being an officer unknown to the articles of incorporation and the by-laws, must be regarded as simply the agent and employee of the corporation, with authority only to execute the orders of the board of directors. It is claimed that, although the board has taken no official action upon the subject, a majority of its members favor the prosecution of these suits. If this be so, that majority can very easily find means to make it well known. The board of directors is the ultimate authority to decide this question. Whatever action the court might take upon the present motion, these suits could not be prosecuted to judgment against the wishes of a majority of the board. Nor can the president prevent their prosecution if the board decides that they shall go on. What we hold now is that the solicitor has no authority to institute and prosecute suits without the sanction of the board, and that such sanction does not appear in these cases. The motion to dismiss will be sustained, but should the board of directors hereafter order that a motion to reinstate the cases be made, and that the suits be prosecuted to judgment, the court will order their reinstatement.

LOVE, *District Judge*, concurs.

MILTON COURTRIGHT *v.* JAMES N. BURNES.

(Western Division Western District of Missouri. May, 1881.)

1. ACCOUNTING BETWEEN PRINCIPAL AND AGENT.— Where an agent in a settlement with his principal presents an account of debtor and creditor, upon the basis of which an adjustment and settlement is made, the principal acting upon the presumption that such account is correct and relying upon the agent's representations in that regard, if there was either fraud, misrepresentation or mutual mistake in the account, a court of equity will set it aside and place the parties where they were before the settlement was made.
2. COMPROMISE OF CONFLICTING AND DISPUTED CLAIMS.— But where after the relation of principal and agent had terminated the parties came to-

gether, and after full discussion made a general settlement and compromise, not merely of the items of an account stated but of all matters in dispute, including doubtful and conflicting rights — in order to set aside such a settlement some positive fraud must be satisfactorily proved.

Bill in equity brought to set aside a settlement between the parties, and for an accounting.

The facts are sufficiently set forth in the opinion.

DeCamp and *Botsford & Williams*, for complainant.

Waters, Stringfellow and *Woodson & Hull*, for respondent.

MILLER, *Circuit Justice (orally).*—We have arrived at a satisfactory conclusion to us in the case of Milton Courtright *v.* James N. Burnes, and I will proceed to announce the judgment of the court and give our reasons for it.

The history of the transactions which are brought before us by this bill in chancery begins with the proposition of constructing a railroad from some point on the Chicago & Rock Island Railroad, in a southwestern direction through the states of Iowa and Missouri. It is not very clear who was most prominent in getting up the plans. It appears, however, that the defendant, Burnes, was one of the parties engaged in it, and that Mr. Winston, who became president of the corporation organized, was another, and one or two citizens of the state of Missouri besides, and that the main reliance for building the road, at least from Washington, in Iowa, to Cameron, in Missouri, was upon the aid which should be given by the Chicago, Rock Island & Pacific Railroad Company.

The contract for the construction of the road from Washington to Cameron was made by Mr. Courtright, the present plaintiff, and in his name with the corporation known as the "Southwestern Railroad Company." Courtright undertook to build the road between those two points, and he was to receive for the building of the road five million dollars of the bonds of the Southwestern Railroad Company, which would

have been of little value but that their payment was guaranteed by the Rock Island Railroad Company. He was also to receive all such other donations, gifts, subscriptions and aid of every kind as could be obtained along the line of the road from parties interested in having it built. There is no question in our minds — there can be none — but that before or after, but probably before this contract was made, he had an agreement with Burnes and Winston and Aller, three gentlemen residing in this region of the country, that they should have an interest in the profits of the contract. We do not think it is established that they were interested in the contract itself. It does not appear that they would be liable for any loss or that they were under any obligations to the corporation which was to own the road, but it is very clear — and for the purpose of this suit it is immaterial when that arrangement was made — it is very clear that Mr. Courtright agreed with Winston, Aller and Burnes that they should have half of the profits that arose out of that contract, and they should superintend the whole of the construction of the road; that he did not intend to be here to do it, and that he left that to them. In pursuance of that arrangement, and contemporaneously with it, and probably because of it, Winston was made president of the corporation. In order also that Winston might properly represent Mr. Courtright, he had a power of attorney from Courtright. The main part of the road was probably built in that way and under that state of affairs; that is, the road from Washington to Cameron.

About the same time and contemporaneously with this there were several projects for the extension of that road, or connection with it to points on the Missouri river. It is only necessary for the purposes of this suit to speak of the one to Atchison. Contracts were made to build this road to Atchison.

The contract for building the road to Atchison was not given to Mr. Courtrigh It is not material to state in whose name it was taken, because it was assigned to a man by the name of Glover, I believe, to hold in trust. It is equally cer-

tain that in that contract Mr. Courtright had an interest of two-fifths, not as in the other case in its profits, but was interested in the contract, which was held by the trustee for the benefit of the parties.

These works went on simultaneously. About the time the railroad was completed between Washington and Cameron, for some reason or other Mr. Winston ceased to be president of that company, and ceased also to be representative of Mr. Courtright in the contract. There seems to have been a disagreement between him and Aller and Burnes and Campbell, who, about this time, in some way, had become interested in the one-half that did not belong to Courtright. At any rate, Mr. Winston retired from his place as trustee and representative of this one-half interest that was not owned by Mr. Courtright, and also relinquished the power of attorney and right to act for Mr. Courtright; and at that time he delivered to Mr. Burnes an order, stating that he (Burnes) was authorized to assume all the control which Winston had previously had over the matters relating to that contract. And about the same time Mr. Courtright made a power of attorney to Mr. Burnes, giving to him the powers which had formerly been exercised by Mr. Winston. The exact nature and extent of the power of attorney from Courtright to Burnes, it is not necessary, as we think, in this case, to determine. It is admitted by the counsel in this case that at the settlement, which is the main subject of controversy here, all matters which were in controversy were intended to be settled and adjusted. And whether Burnes acted under a power of attorney that was competent or not, or whether DeCamp acted under a power of attorney which authorized him to do all these things, is not material, because it has been admitted in argument, and if not, it is established by telegrams and letters, that DeCamp had full power, and that Burnes was settling up all that was between him and Courtright unsettled, growing out of either or both of these two contracts.

Having stated these preliminary circumstances, we proceed

now to consider the present suit or bill in chancery itself. It was brought by Mr. Courtright on the proposition or idea that Mr. Burnes, as his agent or attorney, had not accounted properly to him for money and property received as such agent and attorney in fact; that there was in his hands a large sum of money and bonds, and perhaps other property, for which he had not accounted, and for which this bill requires him to account before the court.

The bill, after stating that much in general terms, proceeds to say that there had been an attempt at a settlement between Courtright and Burnes, made in August, 1877, and that in this settlement Courtright was represented by his agent and attorney in fact, Mr. DeCamp; that the settlement itself was fraudulent and unjust and in many ways inequitable, and the bill asks that it may be set aside; that a release, which Courtright through DeCamp had given to Burnes, and which on its face purported to be a full satisfaction and adjustment of all claims growing out of these matters, may be set aside on the ground of fraud and misrepresentation practiced by Burnes upon DeCamp in the settlement.

If these allegations are sustained the release ought to be set aside and the case considered *de novo*. If they are not sustained the release executed on that settlement is a full defense to all claims set up in this bill.

So that the first and principal question to be decided is, whether that release is to be treated as fraudulent, and whether it shall be annulled and set aside by order and decree of this court.

The first consideration important in the decision of that proposition is to get at the nature and character of the papers that were executed, and of the settlement that was made. Counsel for the plaintiff in this bill have, throughout the argument of the case, treated the transaction as though Mr. Burnes was nothing more than an ordinary agent employed by Mr. Courtright to look after his interests, and that Mr. Burnes, in that settlement, presented as such agent an account of

debtor and creditor, and that the adjustment was made upon the basis of that account and upon the presumption of Courtright's attorney that the account was correct, and that in coming to that conclusion he relied upon the statements and representations made by Mr. Burnes.

If this statement were true about the account, if there was any fraud, or even if there was no intention of fraud, but if there was a misrepresentation, known to the party who made it, Mr. Burnes; or if there was any serious mutual mistake in such settlement as that, a court of equity would set it aside and place the parties where they were before the settlement was made. Or if such settlement were one in which the accounts were kept solely by the agent, and in which they ought to be kept in regular order in books; in which naturally the principal, if he were present, or his agent, would rely solely on the statements and accounts presented by the agent, any mistake or error growing out of misrepresentation or reliance on the account might be corrected. But we are of opinion that this is not in the nature of a settlement of that kind, and to see what is its nature and character it is necessary to look into the evidence of the matters and things which precede and accompany this settlement. We leave out of the question for the present that Mr. Burnes claims that he and Courtright were jointly interested in this affair, and that it was his right to take care of his own interest in making this settlement, and we proceed to some of the circumstances preceding and accompanying the settlement, to show that it was not such a one as that alluded to.

In the first place, Mr. Courtright seems to have been pressing Mr. Burnes and urging him, for six or eight months, not only to render an account, but the phrase repeatedly used is, "render an account and make settlement and payment." Mr. Burnes, for various reasons, seemed not ready to make a settlement and put it off, asking for time, Courtright pressing all the time for an adjustment of the matter. At this time, in the history of these proceedings, Mr. Burnes was still the at-

torney in fact of Courtright. The power which he held from Courtright, and had held for five or six years, was unrevoked. But in July, 1877, Mr. DeCamp appeared at the business place or residence of Mr. Burnes with a regular power of attorney from Courtright authorizing him to make all the settlements, and with full power to settle all the matters in dispute between them, which power of attorney revoked Burnes' former power of attorney, and discharged him as agent, and he was then no longer agent. Mr. DeCamp appeared at Burnes' place of business with the demand that they proceed to a settlement of the accounts and adjustment of the transactions.

Mr. Burnes then said he was not ready; stated that neither party could then proceed properly to a settlement and adjustment; that he and DeCamp, or DeCamp alone, should go over the line of the road and make inquiries respecting the matters which must be considered in that settlement. All this Mr. DeCamp declined, and the interview at that time resulted in a written agreement between DeCamp, as attorney of Courtright, and Burnes, in which they agreed to meet about the twelfth or fifteenth of August, which was finally postponed till the twenty-second. They signed the paper, both of them, that they would meet for a settlement, and the paper recites in what transactions Mr. Burnes had been engaged, and states that the whole of it was to be settled and adjusted between them. They did meet, and Mr. DeCamp, who was both an attorney-at-law and agent, and attorney in fact for Mr. Courtright, seems to have been satisfied with the knowledge he had of the facts, to go through a settlement. Mr. Burnes was accompanied by his counsel, by Mr. Aller, who was interested with him in these different transactions, and by his nephew, who kept the accounts.

Now if we can imagine anything better calculated to produce an idea that this settlement was to be formal, valid, important and final, than all these details and all these meetings, I do not know how it is to be done. They took two days and more to make a settlement, and papers were produced in the

nature of accounts; but it is perfectly clear in looking at the settlement that was made, and the purpose for which it was made, that they constituted but a very small part; perhaps I am not exactly right in saying a very small part, but they constituted but a part, and probably not the largest part of the transactions which were settled and adjusted at that time.

In fact, so far from that paper being simply the basis on which the accounting of Mr. Burnes and the settlement was made, the parties had not been together long before propositions began to be made for a general compromise. This appears from the telegrams, which are a part of the evidence, passing between Mr. Courtright and Mr. DeCamp, showing that various propositions were made, and that they were not made on the basis of, nor did they rest upon the correctness of the account. But the parties were saying, What will you give and what will you take by way of a settlement of these conflicting claims?

And the settlement was made, the papers were exchanged and formally signed. It does not appear that either party was exactly suited with the settlement. Mr. DeCamp, as near as I can get at it from these dispatches, very soon after the papers were signed, telegraphs to his principal, "Settled on terms I telegraphed. I don't like it." Mr. Courtright says, "Do the best you can and settle, if it is your judgment." Mr. Burnes, when the settlement commenced, denied that Mr. Courtright had any interest in the Atchison branch, or was entitled to anything on account of it. Yet in the settlement finally he recognized that interest, and undoubtedly paid a considerable sum on account of it to Mr. Courtright.

We state these things to show that it is no such thing as merely a recognition of the account, and that the settlement was not made on that basis, but that each and every matter between the parties was settled, or was intended to be settled, and that in the adjustment neither party admitted that the other was right, but that each yielded something for a final compromise. That this is true is evidenced by a matter that

must be considered in two relations, both as to what entered into the settlement to show that it was a compromise, and also to show the impossibility of sustaining this bill on another ground. It was part of that settlement that Mr. Burnes made a formal deed of release and conveyance of quit-claim to Mr. Courtright of any and all interest which he had in certain lands and lots in Iowa and Missouri, which had been contributed and conveyed to Courtright as part of the funds given to enable him to build the road. The title to this land was in Courtright, but it is shown that it is part of the profits of the concern, and that Burnes had one-sixth interest in it. Burnes conveyed all his interests in these lands and town lots, whatever it was. Nobody knows what it was worth, at least it has not been stated in this testimony. Burnes conveyed and released all that interest to Mr. Courtright, and Courtright, in bringing this suit to set aside that settlement, says nothing about that paper, does not offer to return the paper nor to reconvey the land. His counsel say that Mr. Burnes had no interest in this land that was capable of being conveyed. But if Mr. Burnes had any interest in this land it was conveyed by this quit-claim deed made at the settlement; and that he had an interest in the land we have not the shadow of a doubt from the testimony, because all the money that was obtained for the building of the road from Washington to Cameron went into its construction. It was generally admitted that no one received any money from it, and Burnes had received none at the time of this transaction. What profit arose from the building of that part of the road was probably represented by these lands and town lots. It is certain that Burnes had a one-sixth interest in this property; and what became of it? Whatever his interest was, he conveyed it to Courtright at this settlement.

That Burnes had an interest in these lands appears upon the face of the entire negotiation. In the letter from Courtright to Burnes introducing DeCamp in 1876 — in which he tells him that Mr. DeCamp is authorized "to settle with you for my in-

terest yet in your hands arising from the building of the railroad from Washington to Cameron and the Atchison branch road" — in this he says: "I am satisfied our lands are valuable and should receive our care and attention." In his letter in regard to a settlement, the only thing which is pointed out beside the Atchison bonds and their interests is "our lands." Mr. DeCamp, in his second telegram to Courtright about the offers made by Burnes at the settlement, says: "Offers all lands and lots, $20,000 in township bonds, $4,500 cash, to release him alone." To that Mr. Courtright answered: "Suppose you come on with proposition, so that we can talk it over, that I can understand the whole matter. Bring statement of assets in Burnes' hands — collected and outstanding — including lands, lots and houses." Whenever Mr. Courtright speaks of what is in controversy he alludes to these lands; that is the one thing which he purposely points out and specifies as a matter which he wants attended to. And in the Exhibit "F," prepared by Mr. DeCamp as the paper to be signed in the settlement, one of the things set out is that James N. Burnes releases all title, right and interest in the judgments, notes and all real estate in Iowa to Courtright. So Mr. DeCamp himself is aware of this interest, and sets it out in the statement he wants signed at the settlement. And in Mr. Merryman's statement it is said that the said James N. Burnes releases all right, title, claim and interest in all the judgments and notes and evidences of indebtedness in the property aforesaid, and all interest he has in the real estate in Iowa. So it is idle to say that Burnes had no interest in this land, or that Courtright placed no value upon his interest.

We cannot see how we can get rid of the argument that since Mr. Courtright desires this settlement to be set aside the parties must be placed in the situation in which they were before the settlement was made, and the interest in these lands be reconveyed by Courtright to Burnes.

But we do not propose to rest our decision upon that point by any means. We refer to it as showing the purpose and character of the settlement between Burnes and DeCamp. We

think that this was a settlement in the nature of a compromise and adjustment of doubtful and conflicting rights, in which each party desired to settle, and in which each party made concessions, and that they finally came together upon an agreement, each believing at the time he was losing by the transaction, and so settled for the sake of compromise. We say, in such a settlement as that, it must be satisfactorily proved that there was some positive fraud, some false representations made, some gross advantage taken by one party or the other to set it aside; and without going fully into the evidence, it is sufficient to say that neither of us believe that any such case has been made against Mr. Burnes, nor do we believe that he intended to commit any fraud upon Mr. DeCamp in this settlement. We do not believe that any fraud was committed upon DeCamp as the representative of Courtright. It may be that, in rendering his statement in regard to the salary item, it may not have been exactly correct, and we are prepared to admit that there is some doubt about this eighteen thousand dollar salary item, and if this account was all there was in this case, it might be necessary to refer it to a master for investigation. We are not clear that Mr. Burnes was entitled to that. The testimony in regard to the East Leavenworth Company's account of $27,000, or whatever it may be, we think the preponderance of the testimony is in favor of the fact that it was rightfully retained by Mr. Burnes; but whether it is absolutely so or not, it is not necessary to decide in this case. Mr. Burnes made large concessions. Mr. DeCamp was communicating to his principal by telegraph. They were two days in making propositions and counter-propositions. Each said to the other: "You yield and I will yield; we think it is best, in view of other matters, to have all matters between us settled." And they were settled. And it is not for one party to come in and ask that it be set aside unless he can clearly show that he was misled and defrauded. This, in our opinion, has not been done in this case.

With these views, gentlemen, in which my brother Krekel concurs, the bill in this case will be dismissed.

The Domestic and Foreign Missionary Society *v.* Hinman *et al.*

(District of Nebraska. January, 1881.)

1. Conflict of Jurisdiction — Replevin — Service of Writ.— By the service of a writ of replevin, the court from which the writ issues obtains possession and control of the property replevied for all the purposes of jurisdiction in the replevin suit, and no other court of concurrent jurisdiction can subsequently interfere with such possession. The same property cannot be subject to two jurisdictions at the same time, and the first levy, whether made under state or federal authority, withdraws the property from the reach of the process of the other.
2. Same — Property Claimed as a Trust for Charitable Uses.— The rule above stated applies, notwithstanding one of the parties may claim the property for the purposes of a public charity only. The question is, whether by taking jurisdiction this court will deprive another court of concurrent power of the right to proceed to judgment in an action commenced before the institution of these proceedings.

Bill in equity.

Motion to dissolve injunction upon bill, answer and certain proofs on file.

The facts are sufficiently stated in the opinion.

J. M. Woolworth, for complainant.

George W. Doane, for respondents.

McCrary, *Circuit Judge.*— As one of the grounds upon which the respondent moves to dissolve the injunction, it is alleged that the property in controversy was, at and before the time of the commencement of this suit, and still is, in the possession and control of another court of concurrent jurisdiction, to wit: The district court of the state of Nebraska, in and for the county of Knox, and that therefore this court ought not to take jurisdiction. The property which is the subject matter of this suit consists of certain buildings erected upon an Indian reservation in Knox county, Nebraska, and the furniture, etc., connected therewith, used as a chapel for religious worship, and for Sunday schools and other religious

purposes, including clergyman's residence, apartments for an industrial school for Indians, dwellings for employees, etc.; also a farm of about thirty acres of cultivated land. Neither party to this suit claims any title to the soil. The property is used in connection with a church and school established for the civilization and education of Indians; but whether it is the property of the complainant or of the respondent S. D. Hinman is the principal matter of dispute between the parties to this suit.

The bill was filed July 30, 1880. It sets forth the facts concerning the acquisition of the property in question, and the purposes for which it was acquired as claimed by the complainant, and concludes with the following prayer:

"Wherefore your orator prays the aid of this honorable court as follows:

"1. That the said defendants answer this, your orator's bill, according to the course and practice of this court, but not under oath, their answer under oath being hereby waived.

"2. That the said defendants and each of them, and the attorneys, counsellors, agents and employees of each of them be, by the order and injunction of this honorable court, enjoined and restrained from claiming, using, occupying, incumbering, disposing of or interfering or in any manner intermeddling with the said buildings and the furniture, fixtures and appliances therein, the said farm and crops, or the use of the same for the said mission and its work; and also from interfering with, obstructing or preventing the said plaintiff, its agents and employees, from resuming and taking possession of said property and all thereof, or in using the same or in carrying on the said work of the said mission, as it has been done prior to the twenty-third of June last past.

"3. That a receiver be appointed with the usual powers of receivers in such cases, to take possession of the said property and all thereof, and resume and conduct the work of the said mission.

"4. That it be decreed that the said defendants and each of

them has no right, title or interest in the said property, and that the injunction above prayed may be made perpetual.

"5. That your orator have its costs of this suit and all other relief that is necessary and equitable."

On the twenty-third day of June, 1880, more than a month before the commencement of this suit, the respondent, S. D. Hinman, brought an action of replevin in the district court of Knox county, Nebraska, against William W. Fowler, who was then in possession as complainant's agent, to recover possession of said property; and thereupon a writ of replevin was issued, and the officer's return shows that on that day he seized the property and delivered it to said Samuel D. Hinman, taking from him the bond and security required by the statute. Afterwards in November, 1880, the complainant entered its appearance in said replevin suit in the state court and was made a party thereto and given sixty days to interplead. The replevin suit is still pending.

There can be no doubt that by the service of the writ of replevin the property came into the possession of the state court for all the purposes of jurisdiction in that case. The rule upon this subject is not doubtful. The same property cannot be subject to two jurisdictions at the same time. The first levy, whether made under the federal or state authorities, withdraws the property from the reach of the process of the other. Where there are several authorities equally competent to bind the goods of a party, they must be considered effectually and for all purposes bound by the authority which first actually attaches upon them. "This rule," says Mr. Justice Campbell, in *Taylor* v. *Carryl*, 20 How. 594, "is the fruit of experience and wisdom, and regulates the relation and maintains harmony among the various superior courts of law and chancery in Great Britain." In *Buck* v. *Colbath*, 3 Wall. 341, Mr. Justice Miller stated the rule in these words: "The principle is, that whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court and under its con-

trol for the time being, and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." See also to the same effect, *Freemen* v. *Howe*, 24 How. 450; *Hagan* v. *Lucas*, 10 Peters, 400.

This general rule is not controverted by counsel for complainant, but he insists that it does not apply to this case, because the property in controversy is held and claimed for the purposes of a public charity only, and that consequently a trust attaches to it, which necessarily gives this court jurisdiction over it.

In the first place it must be said in answer to this suggestion, that whether this is trust property belonging to the complainant as trustee, or individual property of the respondent Hinman, is one of the questions in dispute between the parties, and is, indeed, the very question which must be determined by the state court in the replevin suit, and by this court also if our jurisdiction shall be maintained. It cannot therefore be assumed, in determining the question of jurisdiction as an established proposition, that the property is trust property, and that the complainant is entitled to it as trustee. But even assuming that the complainant is right as to the fact, and that this property is a trust property purchased with funds contributed to the complainant or its agents for the purpose of aiding in a public charity, it still remains true that every question which can arise touching the possession of it may be properly decided by the state court in the replevin suit. A trustee who has the right to the possession of specific articles of personal property which are wrongfully withheld from him, may, without doubt, bring an action at law in replevin to recover the same. The real question here is this: If the jurisdiction of this court be maintained; if the injunction heretofore granted be continued in force and finally made perpetual, will it deprive the state court of the power to go on and determine the issues in the replevin suit, rendering judgment

according to its own views of the law and the facts, and to execute the same by its own process? A reference to the pleadings in the two cases will furnish a ready answer to this inquiry. We are asked in this case to enjoin the respondents from claiming, using, occupying, incumbering, disposing of or interfering or in any manner intermeddling with the property in controversy. Now it is perfectly clear that while this injunction is maintained the state court cannot go on and adjudge the possession of the property to be in the respondent. The injunction forbids the respondent to take possession of, or to hold, or to intermeddle with the very property which the state court has directed its officers to place in his hands, upon his giving bond to answer for it at the end of that suit. The bill also prays that a receiver be appointed to take possession of the property, which is, of course, entirely inconsistent with the exercise of any jurisdiction or control over it by the state court. It also prays for a decree that the said defendants and each of them have no right, title or interest in the said property, and that the injunction may be made perpetual.

By reference to the General Statutes of Nebraska on the subject of replevin, chapter 11, pages 552 to 555, it will be seen that the question of the right of property as well as the right of possession may be tried in the replevin suit; but whether the judgment in that case extends to a determination of the right of property, or stops with that of the right of possession, in either case its judgment might be rendered entirely nugatory by the decree in this case.

Complainant relies upon the case of *Watson* v. *Jones*, 13 Wall. 679, as sustaining his view of the case before us. In that case a state court of Kentucky had decreed that the possession of certain church property should be delivered to certain persons who were held to be legal officers of the church and entitled, for the time being, to control its property. It was held that the nature and character of the possession, so decreed to be delivered, might be inquired into by another court, and if it was of a fiduciary character, and the trust was not involved in

the first suit, the second suit might be maintained in any court of competent jurisdiction to declare, define and protect the trust, though the first suit might still be pending.

There is this clear distinction between that case and the one at bar. None of the parties to the case of *Watson* v. *Jones* claimed any individual interest in the property in controversy. Here, as we have already seen, the respondent does claim to be the absolute owner, and to test his right has commenced a suit in the courts of Nebraska. It was not, however, held by the supreme court in *Watson* v. *Jones*, that any relief could be granted which would interfere with the execution of the decree of the state court. On the contrary, Mr. Justice Miller who delivered the opinion, on page 720 says: "Under this prayer for general relief, if there was any decree which the circuit court could render for the protection of the right of the plaintiffs, *and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the marshal of the Louisville chancery*, that court had a right to hear the case and grant that relief."

It appears, therefore, that the jurisdiction was maintained upon the ground that it was not necessary, in order to maintain it, that any judgment or decree should be rendered interfering in any way with the action of the state court in a suit previously commenced. Indeed, the rule that, as between courts of concurrent jurisdiction, the court which first gets possession of the property must retain it to the end, is distinctly affirmed in that case. Its application to the facts presented in that record was denied upon the ground that the issues in the two cases were essentially different, and that in the case in the federal court the relief sought was different from that awarded in the state court. On page 717 Mr. Justice Miller points out these differences very clearly and adds: "This brief statement of the issues in the two suits leaves no room for argument to show that the pendency of the first cannot be pleaded either in bar or abatement of the second."

It is true that here the case in the state court is an action

at law, and that the present case is a suit in equity; but the rule applies notwithstanding. See Conkling's treatise, page 296. The case of *Taylor* v. *Carryl*, *supra*, was one of conflict between the purchaser of a vessel, under the judgment of a state court in an attachment case, and another purchaser, under the decree of a federal court in a proceeding in admiralty. It was insisted in that case that by virtue of the exclusive jurisdiction of the federal courts in admiralty over the vessel in question, its judgment was a lien prior to that in the state court, although the suit in the latter court was first instituted; but the court held that the vessel, being in the lawful custody of the sheriff by virtue of the process of the state court, was beyond the reach of the process of any other court, whether a common law court proceeding as such, or of a court of admiralty in a suit *in rem* to enforce the maritime lien. No valid seizure was possible upon the process issued by the federal court, for the reason that the vessel was in the custody of the state court.

Section 720 of the Revised Statutes of the United States provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

From what has already been said it is manifest that the effect of the injunction in this case would be to stay proceedings in the state court in the replevin suit. It would be to retain the property in the possession of the complainant regardless of the writ issued by the state court ordering it to be placed in the possession of the respondent. It would be to stop altogether the proceedings in the replevin suit, because it would be impossible to proceed with that suit without violating the injunction prayed in this case.

These considerations necessarily lead to the conclusion that the granting of an injunction in this case, after the commencement of the replevin suit in the state court — of which neither the court nor the counsel was advised — was an error, and that therefore the injunction must be dissolved; and it is so ordered.

THE KANSAS PACIFIC RAILWAY COMPANY *v.* THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY.

(District of Kansas. January, 1881.)

1. LAND GRANT ACTS CONSTRUED — LANDS "RESERVED OR OTHERWISE DISPOSED OF BY THE UNITED STATES."— By act of July 1, 1862, certain lands (not including those in controversy) were granted to complainant. By act of July 2, 1864, that grant was enlarged so as to include the land in controversy; but by an intervening act (that of March 3, 1863), they were granted to the state of Kansas for the use and benefit of respondent. *Held*, that by virtue of the act last named, and the withdrawal of the lands thereunder before the passage of the act of 1864, respondent acquired the title.
2. SAME — SAME — WITHDRAWAL BY THE SECRETARY OF THE INTERIOR. The act of the secretary of the interior in withdrawing the lands from sale, pre-emption or homestead entry amounted to a reservation of the lands within the meaning of the act of 1864, which excepted from its operation all lands "sold, reserved or otherwise disposed of by the United States."

In equity.

The lands in controversy in this suit are situated in the counties of Wabaunsee and Osage in the state of Kansas. They are claimed by complainant as the successor of the Leavenworth, Pawnee & Western Railroad Company under the act of congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean," etc., approved July 1, 1862 (12 Stat. 489), and the act amendatory thereof, approved July 2, 1864 (13 Stat. 356).

They are claimed by the respondent under and by virtue of the act of congress entitled "An act for a grant of lands to the state of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said state," approved March 3, 1863 (12 Stat. 772).

The first named act granted to the Leavenworth, Pawnee & Western Railroad Company (now the Kansas Pacific Railway Company) "every alternate section of public land designated by odd numbers to the amount of *five* alternate sections per mile on each side of" the railroad authorized by the act to be

constructed by said company "on the line thereof, and within the limits of *ten* miles on each side of said road, *not sold, reserved or otherwise disposed of by the United States*, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." By section 4 of the amendatory act of 1864, the above provision was amended by striking out "five" where the same occurs and inserting in lieu thereof the word "ten" and by striking out the word "ten" where it occurs and inserting in lieu thereof the word "twenty," thus doubling the land grant. The original act (section 7) authorized the secretary of the interior, upon the filing of a map designating the general route of the road, to "cause the lands within *fifteen* miles of said designated route or routes to be withdrawn from pre-emption, private entry and sale," and by the amendatory the act word "fifteen" in said clause was made to read "twenty."

The lands in controversy were public lands July 1, 1862, and are within twenty miles of complainant's road as located and constructed, and have not since been entered under any pre-emption or homestead law or otherwise reserved or disposed of by the United States, unless they are embraced in the grant to the state of Kansas by virtue of said act of March 3, 1863, and proceedings thereunder as herein shown, and inure to that grant instead of the grants to the complainant.

The state of Kansas by an act approved February 9, 1864, accepted the grant made by the aforesaid act of congress of March 3, 1863, and conferred the same upon the respondent (Compiled Laws Kansas, 1879, p. 778). The grant to the state and by the state to respondent was of "every alternate section of land designated by odd numbers for ten sections in width on each side of said road."

The lands in controversy are within the limits of the enlarged grant to complainant made by the act of July 2, 1864, but not within the limits of the original grant of 1862; that is to say, they are outside of the fifteen miles limit and are within the twenty miles limit. They are also within the ten miles

limit in the grant to the state, being in fact at a point where the two grants cross each other.

On the nineteenth day of March, A. D. 1863, the commissioner of the general land office, under instruction of the secretary of the interior and with his approval, made a withdrawal of lands in said state of Kansas under said act of congress approved March 3, 1863, withdrawing all of said lands with other lands from market or entry at public or private sale, or location or entry under the homestead or pre-emption laws of the United States or for other purposes, which said withdrawal was to take effect from and after its receipt at the local land office in said state, and which was received at the local land office at Topeka, Kansas, in which land district all of said lands in controversy were then situated, on the thirtieth day of April, 1863, and immediately took effect on said day, and has since said day continued in full force and effect.

All of the lands in controversy were included in and covered by the said withdrawal made on account of the said act of congress, approved March 3, 1863.

Both the said complainant and defendant have done everything necessary to be done under the law to entitle them to the lands in controversy, provided no prior legal right or reservation had intervened for the benefit of the other.

J. P. Usher, for complainant.

Ross Burns, *A. A. Hurd* and *Geo. R. Peck*, for respondent.

McCrary, *Circuit Judge.*—The lands in controversy were not granted to the complainant by the original Pacific Railroad act of 1862. They are outside of the limits of that grant. If complainant's title can be sustained at all, it must be under and by virtue of the amendatory act of July 2, 1864, enlarging the Pacific Railroad grant. Under this latter act the complainant undoubtedly acquired the title, unless by the intervening grant to the state of Kansas of March 3, 1863, and the with-

drawal of the lands thereunder, they were within the meaning of the statute "reserved or otherwise disposed of by the United States." These several acts occurred in chronological order as follows:

July 1, 1862. Original grant.

March 3, 1863. Grant to the state.

April 30, 1863. Lands withdrawn from market by order of the commissioner of the general land office with the approval of the secretary of the interior.

July 2, 1864. Amendatory act passed enlarging the original grant.

The case turns upon the effect that is to be given to the act of the interior department withdrawing the lands from sale, pre-emption or homestead entry. Did this withdrawal amount to a reservation of the lands within the meaning of the grant? If so, the lands in controversy did not pass by the grant of 1864, and the complainant has no title. In the case of *Walcott* v. *Des Moines Co.* 5 Wall. 681, the opinion was expressed that the interior department was the competent power to make an order withdrawing or reserving public land from sale, and it was held that, if this were not so, a grant of land for a specific purpose "carried along with it by necessary implication, not only the power, but the duty of the land office to reserve from sale the lands embraced in the grant." The proposition that wherever there is authority to withdraw any of the public land from market, the land department of the government is the proper authority to make the order of withdrawal, is to my mind too clear to require argument to enforce it. Nor can there be any doubt that the moment the grant of March 3, 1863, was made, the authority to withdraw the lands embraced therein was created.

It is also well settled that a withdrawal of public lands from sale by competent authority for the purpose of appropriating them to any lawful purpose operates to sever such lands from the public domain. *Wilcox* v. *Jackson*, 13 Pet. 498; *Leaven-*

worth, etc. R. R. Co. v. *United States*, 92 U. S. 745; *Railroad Co.* v. *Fremont Co.* 9 Wall. 94.

Complainant, however, relies on the ruling of the supreme court in the case of *Missouri, etc. Railroad Co.* v. *The Kansas Pacific Railway Co.* 97 U. S. 491.

In that case the acts under which the complainant claims were construed. Mr. Justice Field, in delivering the opinion of the court construing the two acts together, said:

"When the location was made and the sections granted ascertained, the title of the plaintiff took effect by relation as of the date of the act, except as to the reservations mentioned, the act having the same operation upon the sections as if they had been specifically described in it.

"It is true that the act of 1864 enlarged the grant of 1862, but this was done, not by words of a new and an additional grant, but by a change in the words of the original act, substituting for those there used words of larger import. This mode was evidently adopted that the grant might be treated as if thus made originally; and therefore as against the United States the title of the plaintiff to the enlarged quantity, with the exceptions stated, must be considered as taking effect equally with the title of the less quantity as of the date of the first act."

I do not understand the supreme court to hold that the amendatory grant of 1864 passed to the grantee the title to land which congress had in the meantime granted to another, or which had in the meantime been by competent authority otherwise disposed of. It is certainly clear that during the time intervening between July 1, 1862, when the original grant was made, and July 2, 1864, when it was amended and enlarged, the United States was at liberty to dispose of any public lands outside of the limits of the original grant, and the lands in controversy were during that period public lands outside of said grant. They were, I presume, up to the time of their withdrawal under the grant to the state, lands in the

market subject to pre-emption or homestead entry. If any of them had been, prior to the passage of the act of 1864, disposed of under the pre-emption or homestead laws — or patented to private parties under any law of the United States, it would, I apprehend, hardly be claimed that lands thus disposed of would have passed to the complainant. And yet this would be the logical consequence of holding that the two acts are to be construed as one act *for all purposes.*

The supreme court was careful to avoid this construction.

It is said that "when the location was made and the *sections granted ascertained*, the title of the plaintiff took effect by relation as of the date of the act, *except as to the reservations mentioned.*" There is in this language a distinct recognition of the fact that the reservations mentioned did not pass, and that an inquiry was necessary to ascertain what sections did and what did not pass. But to make the meaning still more definite and certain the supreme court add, "and therefore *as against the United States* the title of the plaintiff to the enlarged quantity, *with the exceptions stated*, must be considered as taking effect equally with the title to the less quantity, as of the date of the first act." This language not only does not authorize, but it forbids the inference that as against an intervening grantee of some of the lands included within the limits of the larger grant, the title would pass under the two grants as of the date of the former.

It is only as against the United States that this construction prevails. As against other grantees claiming adversely to the United States as well as to complainant, the later act must be considered as a subsequent grant and as taking effect only from its date.

Decree for respondent.

In re Dixon, Bankrupt.

(Eastern Division Western District of Missouri. January, 1881.)

1. Homestead Exemption — Contract — Accord and Satisfaction.— Under section 2695 of the Revised Statutes of Missouri, the homestead of a debtor who is the head of a family is exempt from sale for debts contracted before its acquisition by such debtor. Where a single note was given by the debtor before the acquisition of the homestead, and after such acquisition it was agreed between the parties that said note should be given up and cancelled, and five new notes for sums ranging from $100 to $150 should be given in its stead, in order to enable the creditor to sue in a justice's court, *held*, that such new notes created new indebtedness in place of the old, and were an accord and satisfaction of the latter.
2. Same — Same — Consideration.— An agreement by the debtor at the creditor's request and for his accommodation, to give new notes for small sums so as to enable the creditor to sue before a justice of the peace, is a sufficient consideration for an agreement to cancel a previous contract.

Petition for review in bankruptcy.

Belch & Silver, for petitioner.

J. R. Edwards, for bankrupt.

McCrary, *Circuit Judge.*— Upon petition of the bankrupt the district court ordered that certain land be set apart to him as a homestead, and as such, exempt. This order was made against the objection of the First National Bank of Jefferson City, one of the creditors of the bankrupt estate. The bank files its petition under section 4986, Revised Statutes, praying a review and reversal of said order of the district court. The ground upon which the decision of the court below is attacked is that the debt held by the bank against the bankrupt was contracted prior to the acquisition by the bankrupt of the premises now claimed by him as exempt under the homestead law of Missouri. R. S. Mo. vol. 1, p. 452, sec. 2695.

The proof shows that at the time the original indebtedness was contracted the land in question was held in common by the bankrupt and his father, Levi Dixon. The original debt was contracted January 23, 1874. It does not appear from

the evidence whether the original debt was evidenced by more than one note or not; but it does appear that in January, 1878, by agreement of parties, the said indebtedness was divided into five parts and five new notes were given by the bankrupt for sums ranging from $100 to $150.

This was done, as the record shows, for the purpose of bringing the notes within the jurisdiction of a justice of the peace, prior to the time of the filing of Dixon's petition in bankruptcy. Suit was brought on them and judgments obtained before a justice of the peace, but no part of the judgments has been paid. The new notes were given long after the acquisition by the bankrupt of the full title to his homestead.

Was the taking of the new notes for different amounts for the purpose of enabling the bank to sue upon them before a justice of the peace an accord and satisfaction of the original debt and the making of a new contract within the meaning of homestead act? If the giving of the new notes was another agreement between the parties, differing in any material respect from the original, then the old contract was extinguished and merged in the new. Whether the new agreement shall have the effect of satisfying the original claim depends upon the terms and especially upon the question whether the new promise is founded upon any new consideration.

The question is whether there was an agreement, upon sufficient consideration, to cancel the old and enter into a new contract.

It is not necessary that there should be an express agreement on the part of the creditor to proceed in case of default upon the new and not upon the old indebtedness. It is sufficient if such appears from all the facts and circumstances to have been the intent of the parties. In the present case such intent is sufficiently shown by the cancellation of the original note; by the execution of new notes in small amounts; by the agreement to make new and different notes for different sums so as to enable the bank to sue in a justice's court, which it

could not do on the original claim; by the bringing of suits on the new notes and by proving them, and failing to make any proof of the original debt against the bankrupt's estate. *Babcock* v. *Hawkins*, 23 Vt. 561.

Was there a sufficient consideration for the new agreement? It is not claimed that any part of the original debt was actually paid, but it appears that the bank desired to divide the debt into a number of parts and to take a new note for each part, so as to bring the claim within the jurisdiction of a justice of the peace.

The agreement on the part of Dixon to make five new notes in accordance with the request of the bank and for the purpose named was an agreement upon sufficient consideration, and it must be held to have been an agreement to cancel the original contract and substitute for it the five new contracts, for otherwise the purpose of the contracting parties to bring the claims within the jurisdiction of a justice of the peace would have been defeated. Upon this ground the decree of the district court must be affirmed without considering the other questions argued by counsel.

So ordered.

HALE, AYER & COMPANY *v.* THE B., C. R. & N. RAILROAD COMPANY.

(District of Iowa. October, 1881.)

1. MECHANIC'S LIEN — WAIVER BY TAKING COLLATERAL SECURITY — STATUTE CONSTRUED. — Section 2129 of the code of Iowa of 1873 provides that "no person is entitled to a mechanic's lien who takes collateral security on the same contract." Under this statute, as construed by the supreme court of Iowa, the holder of a claim for labor or materials for a building, erection or improvement upon land, does not waive his right to a mechanic's lien by taking security upon the same contract and upon the same property, unless it appear affirmatively that it was his intention to look to such security and not to his mechanic's lien.
2. SAME — SAME — SECURITY ON OTHER PROPERTY. — If, however, the security taken be upon other property besides that upon which the mechan-

ic's lien rests, it is collateral security within the meaning of the statute, and the mechanic's lien is waived. Accordingly, *held*, that a party who had furnished material to be used in the construction and repair of a railroad, and who took as collateral security certain bonds secured by mortgage upon one division of said railroad, including the rolling stock, had waived his mechanic's lien.

3. FORECLOSURE — SALE ON EXECUTION — NOTICE TO PURCHASER.— Where in a suit to foreclose a mortgage upon a railroad, a party who had furnished materials to be used in the construction and repair of the road intervened and filed a claim to be paid for said materials out of the earnings of the road, but stated in his intervening petition that "no mechanic's lien is claimed:" *Held*, that a purchaser at the foreclosure sale was not bound to take notice of any claim for mechanic's lien upon the road on account of said materials.

Hubbard & Clark, for complainants.

James Grant and *J. Tracy*, for respondents.

MCCRARY, *Circuit Judge.*—The complainants bring this suit for the purpose of establishing and enforcing a mechanic's lien against the lines of railway now run and operated by the defendant, the Burlington, Cedar Rapids & Northern Railway Company, the main line extending from Burlington, Iowa, to Postville, Iowa; the Pacific division extending from Vinton to Traer; the Muscatine division extending from Muscatine to Riverside; and the Milwaukee extension from Linn to Postville. A lien is also claimed upon the rolling stock of said road, upon the right of way, road-bed, station houses, car and engine houses, machine shops and all property or things whatsoever belonging or in any way appertaining to said lines of railway. It appears in proof that the plaintiffs, who are iron merchants at Chicago, Illinois, during the year 1873, and between the first of March and the last of December of said year, sold and delivered to the Burlington, Cedar Rapids & Minnesota Railway Company, then owning and operating said lines, material for use in the construction and repair of its lines, or some of them, as shown by the bill set out as a part of the petition in this case. That in May, 1875, proceedings were commenced to foreclose certain mortgages upon the said

Burlington, Cedar Rapids & Minnesota Railway, and for the appointment of a receiver thereof.

In that case, the complainants, Hale, Ayer & Co., filed their petition of intervention, wherein they prayed that the court would order the receiver of said railway to pay their said claim out of the earnings of said railway, but not claiming a mechanic's lien.

Such proceedings were had in the foreclosure cases that at the October term, 1875, of this court, a decree was rendered and the sale of the railway was ordered, subject, however, to the claims of parties who had intervened in the case, including the said Hale, Ayer & Co. From the said decree an appeal was prosecuted to the supreme court of the United States, where it was held that the intervenors (plaintiffs herein) were entitled to payment out of the earnings of the road of so much of their claim as was shown to be in the nature of supplies, but that for all that part which was for construction, they were not entitled to payment from such earnings. After the decree in the court below, and pending said appeal, these proceedings were instituted under the statute of Iowa for the purpose of enforcing a mechanic's lien for so much of the claim as was for materials furnished for construction purposes.

At the time of furnishing the supplies in question, Hale, Ayer & Co. took the notes of the railway company for the amount due them, and also received as collateral security twenty of the bonds of the said railway company, secured by mortgage upon what was known as the Pacific division of said railroad.

At the sale, under the decree of foreclosure, the entire line of railroad was purchased by the defendant herein, the Burlington, Cedar Rapids & Northern Railway Company.

Upon these facts, several questions have been discussed by counsel, two of which only will be considered. These are:

First. Whether a mechanic's lien was waived by taking collateral security.

Second. Whether the defendant, the Burlington, Cedar

Rapids & Northern Railway Company, purchased the road with notice of the complainant's claim of a mechanic's lien.

A decision of the first question requires a construction of § 2129 of the code of Iowa of 1873, which declares that "no person is entitled to a mechanic's lien who takes collateral security on the same contract." This statute has been several times considered and construed by the supreme court of Iowa, whose ruling upon the question of its construction we are bound to follow. In several cases that court has held that the acceptance of promissory notes for work and labor performed or materials furnished in the erection of a building or other improvement will not divest the right of a party to a mechanic's lien, unless such is the agreement of the parties. *Bonsall* v. *Taylor*, 5 Iowa, 546; *Scott* v. *Ward*, 4 G. Green, 112.

The taking of notes is not the taking of collateral security.

It has also been held, that where a party has done work or furnished materials in erecting a building under a contract with the owner, he does not waive his lien upon such building by accepting the promise of a subsequent purchaser of the building, made in consideration of forbearance to sue, to pay for such work or materials. *Mervin* v. *Sherman et al.* 9 Iowa, 331.

The court in that case, per Wright, chief justice, defines the words "collateral security" to mean "either a separate obligation attached to the contract named, to guaranty its performance, or it may be the transfer of property or other contracts to insure the performance of the principal agreement, and in any event, the contract, promise or property taken must have been intended and accepted as collateral security, before the lien could be said to be waived or defeated."

The latest case upon the subject is that of *Gilchrist* v. *Gottschalk*, 39 Iowa, 311, where it is held that the acceptance of a mortgage for the same debt upon the same property covered by a mechanic's lien is not the taking of collateral security,

within the meaning of the statute, and will not divest a mechanic's lien, unless the lien holder evinces the intention to rely upon the new security rather than upon the lien.

The rule to be deduced from these authorities is, that the holder of a claim for labor or materials for a building, erection or improvement upon land does not waive his right to a mechanic's lien by taking security upon the same contract and upon the same property, unless it appear affirmatively that it was his intention to look to such security and not to his mechanic's lien. If, therefore, in the present case it is made to appear, either that the security afforded by the twenty Pacific division bonds was not upon the same property sought to be subjected to the mechanic's lien, or that the complainants intended to and did rely upon the collateral security afforded by said bonds, in either case the mechanic's lien is waived.

There is testimony tending strongly to show that the complainants did intend to rely upon the security of said bonds, as, for example, the fact that they claimed under the bonds in the foreclosure suit, and received their proceeds in the form of stock in the new company under the decree of foreclosure. But, without dwelling upon this feature of the case, let us inquire whether the security taken was in fact upon the identical property which might have been held by the mechanic's lien.

It appears in evidence that the twenty bonds here referred to were secured by mortgage upon only a part of the railway, to wit: That part known and designated as the Pacific division, being one of four divisions into which the entire railway was divided, and on each of which there was a separate mortgage. Now it does not appear upon what part of the lines the material furnished by complainants herein was used. It certainly cannot be claimed under the evidence that it was all used upon the Pacific division. No such claim is made. On the contrary, the complainants admit that they are unable to show into what part of the lines their material went, and they therefore claim a lien upon all the lines now run and operated

by the defendant, the Burlington, Cedar Rapids & Northern Railway Company, including not only the Pacific division but the main line, the Milwaukee extension and the Muscatine division. It is manifest, therefore, that the security afforded by the twenty bonds of the Pacific division, secured as they were by mortgage upon that division alone, was not a security upon the identical property against which a lien is claimed.

But again, the statute provides for a mechanic's lien upon "the building, erection or other improvement, including any work of internal improvement."

I suppose it would not be contended that under this statute the complainants could enforce a lien as against the rolling stock of the railway for materials furnished or used in the construction of the roadway, and no part of which was used in the construction or repair of such rolling stock.

It has been held by the supreme court of Iowa in the case of *Neilson et al.* v. *The Iowa Eastern R. R. Co.* 51 Iowa, 184, that the rolling stock of a railroad does not constitute a part of its real estate, and that a mechanic's lien upon a railroad does not embrace such property.

If this be a true construction of the statute (and it is at all events a rule of decision for us) it still further illustrates the correctness of the proposition above stated, to wit: That the mortgage bonds, taken as collateral security, are a lien on different property from that upon which the complainants might have asserted their mechanic's lien, for the mortgage securing the bonds covers and includes, so far as the Pacific division is concerned, "all the franchises, fuel, rolling stock, cars, engines, machinery and appurtenances appertaining or belonging to said Pacific division," as well as coal stations, land stations, engine houses and other buildings.

It is quite apparent that a large proportion at least of the property here enumerated would not be subject to a mechanic's lien for iron and other materials used in the construction of the track.

We think it therefore quite clear that the taking of the

bonds in question as collateral security was not equivalent to taking security upon the identical property upon which a mechanic's lien is sought to be enforced.

The second question is whether it appears from the evidence that the purchaser at the foreclosure sale, the Burlington, Cedar Rapids & Northern Railway Company, had notice that the complainants claimed a mechanic's lien upon the road.

They certainly had notice that the complainants held a claim against the old company, and that they were seeking to enforce it as against the earnings of the road in the hands of the receiver under their bill of intervention in the foreclosure cases, but I see nothing in the record of the foreclosure cases which would charge a purchaser at that sale with notice of a mechanic's lien, claimed or to be claimed by these complainants.

They certainly did not claim any such lien in their intervening petition, and in the agreed statement of facts filed in the foreclosure cases it is distinctly stated, not only that the Pacific division bonds above referred to have been taken as collateral security, but also that "no mechanic's lien is claimed." Counsel insist that this was simply an admission of what was apparent without it, that no mechanic's lien was claimed in that case. Even if we admit this, how can it be claimed that the filing of a petition claiming payment out of the earnings of the road, together with an admission that no mechanic's lien was claimed, was sufficient to give to the purchaser at the foreclosure sale notice that a mechanic's lien would or might be claimed? To give the record this construction would be to require the purchaser at the sale to anticipate that the claimants would fail in the end to secure their claim out of the earnings of the road, and would thereupon take measures to enforce their claim, or a part of it, under the mechanic's lien law.

I do not think that the purchaser was bound to anticipate all this.

He was not bound to look beyond what appears upon the face of the record, and nothing appears there indicating any

purpose on the part of the intervenors in that case to claim anything more than that which was claimed by them in their intervening petition.

I think it fair to say that the purchaser was authorized to assume that the claim of the intervenors was fully and completely set forth by them.

Without considering any of the other questions discussed by counsel, these considerations lead to the conclusion that the complainants are not entitled to a mechanic's lien as prayed.

The bill must therefore be dismissed.

THE OMAHA NATIONAL BANK *v.* WALKER *et al.*

(District of Nebraska.)

1. PROMISSORY NOTE — GUARANTY OF PAYMENT — DEFENSE. — Where a promissory note is transferred and the collection of it is guaranteed by the payee in the following form, to wit: "This note is transferred and the collection of the same guaranteed to the holder thereof," the makers can make any defense to a suit commenced by an assignee that could have been made to a suit if commenced by the payee, notwithstanding the assignee may take the note before due and without knowledge of any infirmity in the note.

Motion for new trial.

Wakely, for plaintiff.

Lambertson, for defendant.

DUNDY, *District Judge.* — This suit is based upon a promissory note made by the defendants to one John W. Hazzard, who transferred it to the plaintiff for value before due. The note bears date January 1, 1879, and in terms binds the defendants to pay said John W. Hazzard or order fifteen hundred dollars, two months after the date thereof, with interest at the rate of twelve per cent. per annum after due. The defendants also agree to pay a reasonable attorney's fee, not ex-

ceeding ten per cent., in case it should be necessary to commence suit to enforce the payment of the note. On the note is found the transfer of the same in the following form, to wit:

"This note is transferred and the collection of the same guaranteed to the holder hereof by

"JOHN W. HAZZARD,
"GEO. HAZZARD."

The note was duly protested for non-payment, whereupon suit was commenced against the makers in this court.

The defendants answered in due time and admitted the execution and delivery of the note, but denied:

First. That John W. Hazzard, the payee, had ever transferred the note to the plaintiff.

Second. That the defendants had ever received any consideration whatever for the making and delivery of the note; and

Third. Alleged that the plaintiff had actual notice of the object and intention of the parties to the transaction, and consequent knowledge of the want of consideration at and before the time of the alleged transfer.

A jury trial was had, which resulted in the jury returning a general verdict for the defendants.

The plaintiff moved to set aside the verdict for the reasons, first, that the verdict was not sustained by the evidence; and second, because of errors committed by the court during the progress of the trial.

There is no sort of doubt whatever about the note having been given without consideration. The proof on that point was abundant, and it was not even claimed by the plaintiff that any consideration ever passed from either of the Hazzards to the defendants, before, at the time of, or since the making of the note, on which such a promise can be supported.

On the contrary, it was expressly admitted by the plaintiff before the court and jury, and during the trial, that there was an entire absence and want of consideration for the giving of the note. The note sued on, then, at least between the parties to the original transaction, was a mere *nudum pactum*, and,

as between them, payment of the note could not have been enforced in a court.

The plaintiff sought to obviate this difficulty by showing, or at least attempting to show, that it took the note in the usual course of its business before the same became due, and without notice of the infirmity of the note. There was, however, some testimony which might tend to show that the cashier of the plaintiff had knowledge of the fact that the note was given for a purpose other than the one to which it was applied. At all events, the proof before the jury showing want of consideration for the giving of the note was abundant, and if the jury was justified in acting on such proof, then the verdict must stand, unless it be contrary to law.

The errors said to have been committed by the court consist, in the main, of two or three written instructions given to the jury on behalf of the defendants, which instructions are claimed to be erroneous and prejudicial to the rights of the plaintiff. It has not been made apparent that the instructions complained of are at all erroneous, nor is it thought that their correctness can well be controverted. But as I now view the law that applies to this case and must control the rights of the parties, it is wholly immaterial whether the instructions complained of were right or wrong. If the defendants were in a position to enable them to show a want of consideration for the giving of the note, then the verdict of the jury is clearly right, for, as before stated, it was fully conceded on the trial that no consideration passed from Hazzard to the defendants as an inducement to make the note.

The note is made payable to John W. Hazzard, but it was, as a matter of fact, "transferred and the collection of the same guaranteed" by George Hazzard, he signing the name of John and his own to the guaranty. But whether he had the rightful authority to use the name of the payee in this connection did not clearly appear. Nor do I think it necessary to examine this question, notwithstanding much importance was attached to it in the argument.

Now can such a "transfer and guaranty of collection" of a promissory note be regarded as an indorsement of commercial paper, so as to bring the transaction within the principles regulated and controlled by the law merchant? If not, then the defendants were in a position to insist on the defense, which seems to have been available to them notwithstanding the bank may have purchased the note without knowledge of such defense.

It is perhaps correct to say that the title to this note would have passed to the bank so as to have enabled it to maintain a suit without any indorsement or written transfer thereof or thereon. But in such a case as that the purchaser would take the note subject to any defense which might be made to a suit instituted in the name of the payee. The usual and ordinary rules and regulations governing the sale and transfer of commercial paper must be observed in order to cut off defenses available as against a payee.

Negotiable promissory notes are usually made payable to a particular *person*, or *bearer*, or *order*, and the title thereto passes by sale and delivery, without any formal indorsement. Other apt words may possibly supply the places of the well known ones of "order" or "bearer," which are the ones in universal use.

Notes transferred and properly indorsed use one or the other of those expressive words. If neither is used in an indorsement, but the same is made in blank, the holder for value has the right to fill up an indorsement, so as to make it conform to the custom prevailing at the time and as sanctioned by the law merchant. Such an indorsement carries with it a new liability on the part of the indorser. He virtually guarantees the payment of the note when due, and agrees to pay it himself, in case the maker fails to do so, if he receives timely notice of the dishonor. In such case the holder can at once proceed by action against the maker and indorser to enforce payment of the note. In this state he can proceed against one or all, both maker and indorser. He need not exhaust an ex-

pensive remedy against the maker before he can call on the indorser to pay. He can elect to proceed against either or both, at his option. This is one of the most valuable remedies and wise provisions of the commercial law, which commends itself to the good sense of every commercial nation, and has been sanctioned and upheld for ages. It is not so with the note in suit. The note is "transferred, and its collection guaranteed." This is not in any sense a "commercial indorsement." The relations of the parties are entirely different from what they would have been had the note been indorsed in the ordinary and usual way.

Here the bank could not sue either of the Hazzards until after it had exhausted its legal remedies against the makers without beneficial results. This would be indispensable to a recovery against the guarantors. The guarantors could not be joined as defendants with the makers of the note, the obligations to the holder being entirely different.

The obligation of the indorser being, in substance, that if the maker of the note does not pay at maturity he will himself do it for the maker. The obligation of the party who guarantees the collection of a note simply binds himself to pay the debt, provided it cannot be made out of the principal debtor by due process of law. This latter relation is the one the Hazzards sustain to the bank as plaintiff in this case.

It follows then, as a necessary consequence, that the transactions between the Hazzards (the guarantors) and the plaintiff (the bank) cannot be upheld under the commercial law so as to deprive the defendants of the defense pleaded in this suit.

The "transfer and guarantee of collection" operates as an assignment only of the note; as such it is undoubtedly good, but it carries with it no greater or higher obligation.

At common law choses in action were not assignable. Not so now, however. Now they may be assigned so as to enable an assignee to sue thereon in his own name, but the right of defense is still maintained, and any defense that could have

been made in a suit between the original parties to the transaction can still be made in a suit brought by an assignee.

For these reasons I must hold that the defendants had the right to defend against the note for want of consideration, and that the verdict of the jury is right and proper and must not be disturbed, even if the errors complained of were actually committed by the court. See *Trust Co.* v. *Nat. Bank*, 11 Otto, 68; *Lamourieux* v. *Hewitt*, 5 Wendell; *Miller* v. *Gaston*, 2 Hill, 188.

Southern Express Company v. Memphis, etc. Railroad Company.

(Eastern District of Arkansas. July, 1881.)

1. Railroad Company — Duty as Common Carrier.— A railroad company, being a common carrier, is bound to receive and carry the goods of all persons alike, without injurious discrimination as to terms and rates.
2. Same — Same — Duty to Carry Express Matter.— It must receive and carry for express companies the articles known as express matter, without discrimination in favor of itself or any other express company.
3. Same — Same — Equality among Express Carriers.— If the railroad company engages in the business of express carriage itself, it must do so on terms of perfect equality with all other express carriers.

Bill in equity.

The complainant, an express company, has been for many years engaged in carrying on an express business over the respondent's railroad. No written contract was ever entered into between the parties; but the business was carried on without objection, and upon terms mutually satisfactory, until some time in the year 1880, when the railroad company asserted its own right to transact all the express business upon its line, and attempted to eject the complainant therefrom. Upon the application of complainant, and upon the allegations contained in his original bill, a temporary injunction was, on the twenty-first of June, 1880, granted by the district judge,

restraining the respondent from interfering with the complainant, etc., and from preventing the complainant from carrying on the express business over said road, and from enjoying the same facilities in the conduct of such business permitted to any other express company, or exercised by the respondent itself, on payment by complainant of reasonable compensation therefor.

On the twelfth of May, 1881, the complainant filed a supplemental bill, by which it is alleged that respondent has engaged in the express business over the said line of railroad, and established express offices, agents, wagons, horses, etc.; that the complainant has also continued in such business. It is further averred that since the granting of the injunction herein the respondent has "continuously resorted to unlawful, unjust, arbitrary and unreasonable expedients to circumvent the force and effect of the orders and decrees of this court on his original bill, as aforesaid, and by imposition upon the plaintiff of unlawful, unreasonable, unjust and discriminating terms, conditions and restrictions not imposed upon itself engaged in the express business, to destroy the plaintiff's business and competition on the defendant road, and to accomplish indirectly that exclusion forbidden by the orders of this court in this cause."

The supplemental bill sets forth in detail the terms and restrictions imposed upon the complainant, the principal of which is, that the complainant is charged unjust and extortionate rates for the transportation of express matter. The prayer of the supplemental bill is, that the injunction granted under the original bill may be modified so as to restrain the respondent from charging complainant, upon its bags, safes, packing trunks, chests and boxes, a higher rate than upon other freights of like weight and bulk, and from charging complainant upon other freights a higher rate than it charges for similar express matter received from or delivered to the custody of the Iron Mountain, etc. Railroad Company Express, or the Pacific Express Company; also from discrimi-

nating against the complainant in favor of itself or any other express company or person in the matter of rates, etc.

Upon the presentation of the supplemental bill, the respondent moved to dissolve the injunction allowed upon the original bill; and the complainant moved for a modification of the injunction as prayed in the supplemental bill; and both motions were by consent set down for hearing before the circuit judge at St. Louis, on Saturday, the fourth day of June, 1881, and were then fully argued by counsel before him.

F. E. Whitefield and *Glover & Shepley*, for complainant.

B. C. Brown and *J. O. Broadhead*, for respondent.

McCrary, *Circuit Judge.*— I. I will consider first the motion to dissolve the injunction. This is urged upon two grounds, to wit: 1. That the railroad company is by its charter possessed of the exclusive privilege of conducting the express business over and upon its own road; and 2. That even if this were not so, the express company has no right to carry on its business upon said road without the consent of the railroad company. Does the charter of the respondent railroad company confer upon it the exclusive right to carry on the express business upon its own road? The answer to this question depends upon the construction of the 6th section of said charter, which provides as follows:

"The said company shall have the exclusive right of transportation or conveyance of persons, goods, merchandise or produce over said railroad by them to be constructed."

This language must be construed in the light of the history of the construction of railroads in this country. When first introduced they were regarded only as improved highways subject to be used by the general public. It was thought that any person ought to have the right to place his vehicle upon the track of a railroad, and to transport his own freight upon it, upon paying toll for the use of the track, and it was considered necessary, in order to limit the use of the road, and to

give a particular person or company the exclusive right to operate it, that such exclusive right should be expressly reserved by law. It was for this purpose that clauses substantially like the one above quoted were inserted in very many of the earlier, and not a few of the later, railroad charters. Experience very soon demonstrated that it was not practicable to apply to the system of railways all the principles that obtained in defining and regulating the rights of the public with respect to the common highway. Certain innovations were necessary; certain exclusive privileges were inevitable in order to secure safety and celerity in the transportation of persons and property by the use of cars and steam engines. One of the first of these to be generally recognized was the necessity that the operation of every railroad should be under the control of a single head. It was seen that the safety, not only of property, but of life as well, depended upon vesting in the owner of the track, or the company operating the road, the exclusive right to say what vehicles should be placed upon the track, or in other words, the exclusive right of transportation and conveyance of persons and property over their tracks. An examination of the railroad charters adopted by the various legislatures of the Union will show that this provision has been inserted in nearly all of them in one form or another. It was never intended to apply to or determine such a question as that now under consideration. It gives the railroad company the exclusive right to place cars on the track and operate them for the transportation of persons, goods, wares and merchandise. It gives no other or greater exclusive right. It follows that the question whether the railroad company has the exclusive right to carry on the express business upon its line, and the right to eject the complainant must be determined independently of this provision. This brings us to the question whether the express company may, as a matter of right, carry on its business upon the respondent's road? Substantially this question has recently been considered by several of the courts of the United States, and it has been uniformly

held that it is the duty of the courts to maintain such right, by granting a preliminary injunction, at least, until there can be a final hearing upon the merits. Such has been the ruling of Mr. Justice Harlan on the circuit; of Judge Baxter of the sixth circuit; and of District Judges Key, Gresham, Treat, Hallett and Caldwell. I am of the opinion that these decisions are sound in principle, as well as of great weight as authority. They will be followed unless the supreme court shall otherwise decide. The guiding principles running through them all, and which should govern in determining the respective rights of the parties, are these:

1. A railroad company is a *quasi* public corporation, and bound by the law regulating the powers and duties of common carriers of persons and property.

2. It is the duty of such a company, as a public servant, to receive and carry goods for all persons alike, without injurious discrimination as to rates or terms.

3. The business of expressage has grown into a public necessity. It is the means whereby articles of great value may be carried over long distances with certainty, safety and celerity, being placed in the hands of a special messenger, who is to have the charge and care of them *en route*. The railroad companies must, in common with the public, recognize the necessity for this mode of transportation, and must carry express packages and the messenger in charge of them for all express companies that apply, on the same terms, unless excused by the fact that so many apply that it is impossible to accommodate all — a state of things not likely to occur. If it be said that this is giving to the express companies privileges not afforded to other shippers, the answer is that the nature of the express business makes special facilities for its transaction necessary, and the case is, therefore, properly exceptional.

4. It is not necessary now to determine whether the respondent railroad company may, under its charter, engage in the express business, and undertake to carry and deliver ex-

press packages beyond its line. If is enough for the present to say that if it possesses the right to engage in this business at all, it must do so upon terms of perfect equality with all other express companies, and the court will see that it does not take to itself any privileges in this regard that it does not extend to complainant.

The motion to dissolve the injunction is overruled.

II. What has been said virtually disposes of the questions raised by the supplemental bill. The railroad company is bound to carry for the express company for a reasonable compensation, and must not discriminate against it. A court of chancery has power to decree a compliance with this wholesome regulation. This court cannot for a moment sanction the proposition that the railroad company may, by extortion or unjust discrimination, exclude the express company from the right to conduct its business upon their railroad. I am not prepared now to fix the maximum rates to be charged for the transportation of express matter, but I have no doubt of the power of the court, after investigation, to do so. An order for this purpose should not, as a rule, be made until after a reference to a master and a report by him after a hearing. For the present, the injunction hereinbefore allowed will be modified so as to enjoin and restrain the respondent from charging the complainant for the transportation of express matter, including closed packages, more than a fair and reasonable rate — such charges in no case to exceed the rate charged upon similar express matter to itself, or to any other express company, or for similar express matter received from or delivered to the Iron Mountain, etc. R. Company Express, or the Pacific Express Company.

Ordered accordingly.

National Life Insurance Company *v.* Harvey.

(District of Iowa. May, 1881.)

1. Insurance — Loan — Usury.— Where a contract for the loan of money and an agreement for insurance upon the life of the borrower are blended together in one and the same transaction, and the proof shows that the policy of insurance was taken and the premium paid in advance in consideration of the loan, the transaction is usurious if independently of the insurance transaction the maximum rate of interest is contracted for.

McCrary, *Circuit Judge.*— Where a contract for the loan of money and an agreement for insurance upon the life of the borrower are blended together in one and the same transaction, and the proof shows that the policy of insurance was taken and a premium paid in advance in consideration of the loan, and that such consideration was over and above the interest allowed by law, the transaction is usurious. *Ins. Co.* v. *Kittle*, 1 McCrary, 234. It is not necessary in such a case to show that the premiums charged were unreasonable. It will be presumed that there was in the transaction of insurance a profit to the insurance company, the lender; and if, independently of the premium paid in advance, the maximum rate of interest has been charged and taken, the insurance and the payment of a premium in advance, if intended as a condition precedent to, and a further consideration for, the loan, will make it usurious. The profit accruing to the lender from the insurance transaction in such a case will be presumed to be something, and whether great or small, being in excess of the lawful interest, it is usury.

We have therefore only to consider whether the proof in this case shows that the policy of insurance upon the life of the respondent was required as a condition precedent to the loan and constituted an additional consideration therefor. This question must, in view of the evidence, be answered in the affirmative. It seems that the proposition was distinctly made to the respondent that if he would apply for a $10,000

life policy the company would loan him $2,000, and the proposition was assented to. The company afterwards insisted upon a modification of the agreement, so as to make the amount of the loan $1,000 instead of $2,000, but it is, I think, clear from the proof, that no loan of any amount would have been made if the respondent had refused to take the insurance and permit the premium ($285) to be retained in advance from the sum loaned. It is equally clear that the respondent would have declined to take the insurance but for the offer with it and as a part of the same transaction of a loan. Indeed it is manifest that the insurance was demanded as an additional consideration, more or less valuable, for the loan. This brings the case clearly within the rule above stated, and the complainant is entitled only to decree for the balance due on the principal of the debt, and must pay the costs.

Decree accordingly.

ANDREWS *et al. v.* LONG *et al.*

(District of Kansas. November, 1880.)

1. PATENT — ARTESIAN WELL — PROCESS OF DRIVING AN INSTRUMENT INTO THE EARTH, ETC. — A patent upon the process of driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upwards, as it is in boring, is not infringed by constructing a well by boring a hole in the earth with an auger somewhat larger than necessary for the insertion of the pipe, and by putting said tube down said hole to the water without any driving or forcing.

In equity.

Guthrie & Brown, for complainants.

Spilman & Brown, for respondents.

MCCRARY, *Circuit Judge.* — This cause has been argued and submitted for final determination upon the merits. It is a bill

in equity brought to recover damages for an alleged infringement of a patent, reissue No. 4372, and for an injunction. No question is made by respondents on account of want of novelty, prior discovery and use, or dedication to the public and abandonment, although these several defenses are set up in the answer.

The single question presented for determination is, whether the respondents have been guilty of an infringement of the patent of complainants.

In order to decide this question it is necessary to give a construction to the patent, and to determine its purpose and scope. The patent is for a new process of constructing artesian wells, and the claim of the patentee is as follows:

"What I claim as my invention, and desire to secure by letters patent, is: The process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as it is in boring, substantially as herein described."

The claim, however, must be construed in connection with, and in the light of, the specifications which also accompany the patent, and from which I quote as follows: "My invention is particularly intended for the construction of artesian wells in places where no rock is to be penetrated.

"The methods of constructing wells previous to this invention were what have been known as 'sinking' and 'boring,' in both of which the hole or opening constituting the well was produced by taking away a portion of the earth or rock through which it was made.

"This invention consists in producing the well by driving or forcing down an instrument into the ground until it reaches the water, the hole or opening being thus made by a mere displacement of the earth, which is packed around the instrument, and not removed upwards from the hole, as it is in boring. The instrument to be employed in producing such a well, which, to distinguish it from 'sunk' or 'bored' wells, may be termed a driven well, may be any that is capable of sustaining

the blows or pressure necessary to drive it into the earth; but I prefer to employ a pointed rod, which, after having been driven or forced down until it reaches the water, I withdraw and replace by a tube made air-tight throughout its length, except at or near its lower end, where I make openings or perforations for the admission of water, and through and from which the water may be drawn by any well-known or suitable form of pump.

"In certain soils the use of a rod preparatory to the insertion of a tube is unnecessary, as the tube itself, through which the water is to be drawn, may be the instrument which produces the well by the act of driving it into the ground to the requisite depth."

The evidence in this case clearly shows that the well constructed and operated by the respondents was made by boring a hole in the ground with an auger somewhat larger than necessary for the insertion of the pipe or tube, and by putting the tube down said hole to the water without driving or forcing; and we are therefore to determine whether a well thus constructed, is within the terms of the complainants' patent, so as to be an infringement thereof.

It is not contended that Green, the patentee, was the original inventor of the idea of drawing water from the earth by the means of a pump, through a hollow pipe or tube having apertures at the lower end to admit the water.

This process is known to have been in use, and in very common use, long before the granting of complainants' patent. It is very clear that the patentee has made no claim of novelty in any part of his process, except the driving or forcing of the pipe down through the earth to the water-bearing strata, without the necessity of digging or boring, or removing the earth upward.

To use the language of the inventor himself, he claims "the process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as it is in boring." One of the

necessary features of the invention, and perhaps the principal one, is the "feature of a tight connection between the tube and the earth, effected by the driving of the tube without removing the earth upward, upon the preservation of which the success of the process depends." *Andrews* v. *Carman*, U. S. Official Gazette, Patent Office, vol. 9, No. 22, p. 1014.

If the boring be resorted to merely for the purpose of facilitating the driving process, that is to say, if the hole bored be smaller than the tube to be driven in, so that the tube is after all driven or forced into the earth, so as to form a tight connection between the tube and the earth, the well thus constructed would, in my opinion, be within the terms of complainants' patent; but if a well is sunk by digging or boring, so that the excavation is larger than the tube to be inserted, and nothing is done but to put a tube down into the excavation without driving, and attach a pump, and in this way secure the water, I am clearly of the opinion that such a process is not within the terms of the patent.

I concur in the construction given to this patent by Judge Blatchford in the case just cited, as follows: "I therefore understand this patent to be a patent for a process, and that the element of novelty in this process consists *in the driving of a tube* tightly *into the earth without removing the earth upward*, to serve as a well-pit, and attaching thereto a pump, which process puts to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into the well-pit, by the use of artificial power applied to create a vacuum in the manner described."

The same view was evidently taken by Judge Nelson and concurred in by Dillon, circuit judge, in case of *Andrews et al.* v. *Wright*, U. S. Circuit Court, District of Minnesota, December Term, 1877.

In that case the learned judge in discussing the question of want of novelty, referring to certain processes in use before the Green patent, said, "it is evident that the results noted therein are obtained by *boring or excavating, and not by*

Green's process. And it is also clear that this process was not used in constructing the salt wells at Syracuse, New York."

I am of the opinion that a well which is constructed by boring or excavating, and where a tube is not forced into the earth by any driving process whatever, is not an infringement of the complainant's patent.

The decree, therefore, must be for the defendants, and it is so ordered. The same order will be made in the case of *William D. Andrews et al.* v. *Ashford Stingley & Orville Huntren*, No. 2766, in which the facts are the same as in the case here considered.

Browning *et al. v.* Porter *et al.*

(Eastern District of Missouri. January, 1881.)

1. Injunction — Bond — Assessment of Damages.— An injunction bond conditioned to "abide the decision" of the suit and "pay all sums of money, damages and costs that shall be adjudged" against the obligors if the injunction shall be dissolved, does not cover the amount of a judgment enjoined by the court nor the costs and attorney's fees therein.
2. Same — Same — Suit at Law.— The question whether a court of chancery on dissolving an injunction will itself proceed to assess damages resulting therefrom, or drive the defendant to a suit at law on the injunction bond, discussed but not decided.

In equity. Motion to assess damages upon an injunction bond.

John H. Overall, for the motion.

Edward McCabe, contra.

Treat, *District Judge.*— A suit in equity was instituted by plaintiffs, and on their motion a provisional injunction issued to restrain proceedings at law on a judgment in a state court.

An injunction bond was given as required, with sureties conditioned to "abide the decision which shall be made thereon (the original suit), and pay all sums of money, damages and costs that shall be adjudged against them, if said injunction shall be dissolved."

Said injunction was dissolved and the bill dismissed.

A motion is now made for the assessment of damages, to wit: the amount of the judgment in the state court, $619; costs in state court, $25; attorney's fee in injunction suit, $200.

It is clear that the bond did not cover the amount of the original judgment and its costs, nor the attorney's fee. *Bein* v. *Heath*, 12 How. 176; *Oelrichs* v. *Spain*, 15 Wall. 230. To the same effect are the Missouri cases cited.

Another question was suggested in the light of the authorities produced, viz.: whether a court of chancery in dissolving an injunction would itself proceed to assess damages resulting therefrom, or drive the defendant to an action at law on the injunction bond.

The motion before the court does not call for a decision on that point, although nothing is seen in the cases cited to deprive the chancery court of its power to finally determine the controversies between the parties before it. The case of *Bein* v. *Heath* was an action on an injunction bond, and the *dicta* in the opinion are very strong.

In that case the court says:

"A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction."

Is that dictum to be received as a general rule, or limited to cases like that then under consideration? It sometimes happens that injunction bonds are conditioned to pay *damages* which the court may assess, and hence, unless the court assesses damages, no cause of action arises on the bond. It may be that the provisional injunction is dissolved on motion, before final hearing and decree on the merits, and that on final hearing the decree is for plaintiff, or for defendant, thus varying the

matter of costs and damages. That final decree would be operative in a suit on the injunction bond, so far as its tenor required; and such a decree would in many cases be necessary to hold the parties to the bond.

It is obvious that the several cases on such bonds must defend on the conditions stated; some requiring the antecedent action of the chancery court, and some requiring no such action.

It is well settled that the proceedings of United States courts in equity are not affected by local statutes; and it is supposed to be equally well settled, that, chancery courts having obtained jurisdiction of the parties and the controversy, will retain jurisdiction for the final settlement of the whole subject matter, so as to avoid multiplicity of suits, including all incidents of the litigation.

Whatever the true rule may be in that respect, the motion in this case asks for what could not be allowed, either at law or equity.

Motion overruled.

SINGER MANUFACTURING COMPANY *v.* ISRAEL YARGER.

(District of Iowa. October, 1880.)

1. TAX SALE — AGREEMENT AMONG BIDDERS NOT TO BID AGAINST EACH OTHER.— An agreement among bidders at a tax sale, either express or tacit, that they will take turns in bidding, and not bid against each other, renders the sale and certificate thereof void.
2. TAX CERTIFICATE — RIGHTS OF ASSIGNEE.— It is settled as the law of Iowa that the assignee of a tax certificate holds it subject to all the infirmities by which it would have been affected in the hands of the tax purchaser.
3. TAX DEED — BY WHOM ATTACKED FOR FRAUD.— While section 897 of the code of Iowa (1873) gives to the owner of the land a remedy for fraud in the tax sale of the same, it does not deny to others a like remedy. A remedy for fraud is allowed to the party injured by the general principles of equity jurisprudence which prevail in the federal courts. A mortgagee of the land may have such remedy.

In equity.

Phillips, Goode & Phillips, for complainant.

—— ——, for respondents.

McCrary, *Circuit Judge.*—The complainant is the owner of a mortgage executed by the defendant Yarger upon certain lots in the city of Knoxville, in this state, given to secure a promissory note for $2,000 and interest. The respondents, McCormick and Baker, are the grantees in a certain tax deed of the same premises, which, if valid, is prior and paramount to complainant's mortgage. The bill alleges that the tax deed is void, and prays a decree to cancel the same and for a foreclosure of the mortgage. The question to be decided is whether the tax deed is a valid conveyance of the property as against the complainant's mortgage. The tax deed is attacked upon the ground that the tax sale was fraudulent and void by reason of the fact that the bidders at the sale entered into an unlawful combination, whereby each was to take his turn in bidding, it being understood that there was to be no competition, and that they were not to bid against each other.

The evidence establishes the fact that there was, if not an express, at least a tacit agreement among the bidders present at the sale that they were to take turns in bidding and that they were not to bid against each other. That such a combination among bidders is fraudulent and vitiates the sale, is, as a general proposition, entirely clear. Whether this doctrine is applicable to the present case is the only matter of controversy. The respondents, McCormick and Baker, who claim under the tax title, were not the purchasers at the tax sale, but are the assignees of the tax certificate. It is settled as the law of this state that the assignee of such a certificate holds it subject to all the infirmities by which it would have been affected in the hands of the tax purchaser. *Light* v. *West*, 42 Iowa, 138.

It is insisted by counsel for respondent that the tax deed

can be attacked on the ground of fraud in the sale only by the owner of the land, and not by a mortgagee. In support of this proposition, section 897 of the code of Iowa (1873) is cited. That section, among other things, provides "that in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling the same, or in the purchaser to defeat the same, and if fraud is so established such sale and title shall be void." While this section gives a remedy only to the owner of the land, it cannot in my judgment be rightly held to deny a similar remedy to others. The complainant's right to recover in the case does not depend upon the statute. If a fraud has been committed, and by it the complainant has been injured, the remedy is provided by the general principles of equity jurisprudence.

It cannot be presumed that the legislature of the state intended by the provision above quoted to deprive any person of a remedy for an actual fraud which existed independently of the statute. Suppose the case of a fraudulent combination to deprive a mortgagee of his security by procuring a sale of the mortgaged premises for taxes without notice to the mortgagee and without competition among bidders. Will it be contended that in such a case the mortgagee could have no remedy, because a remedy in a similar case is given by statute to the owner? I think not. If the statute would bear such a construction, it is more than doubtful whether it would have the effect to deprive this court of its equity jurisdiction in such cases. *The United States* v. *Howland*, 4 Wheat. 108; *Dodge* v. *Woolsey*, 18 How. 347; *Barber* v. *Barber*, 21 How. 583; *Lawrence* v. *Clark*, 2 McLean, 568; *Boyle* v. ——, 6 Pet. 648; *Noonan* v. *Lee*, 2 Black, 500.

Decree for complainant.

BEADLE *v.* BEADLE.

(District of Nebraska. May, 1881.)

1. WILL — POWER OF SALE — CONSTRUCTION. — A will which authorizes the executors to sell real estate and pay certain legacies out of the proceeds, does not vest title in such executors — especially where by the same instrument the testator bequeaths the "rest and residue" of said real estate to his heirs. The entire instrument is to be construed together and so as to harmonize all parts, if possible.
2. SAME — SAME — SAME. — A devise of land to the executors to sell passes the title; but a devise that the executors may sell, or shall sell lands, or that they may or shall be sold by the executors, gives them only a naked power of sale.
3. CONVERSION OF REALTY INTO PERSONALTY — ELECTION. — Where executors are by the will distinctly directed to sell real estate and convert it into personalty and pay proceeds to certain persons, equity will consider the conversion as made and will treat the real estate as personalty; but where the same persons receive the bequest, whether it remain in the form of realty or be sold and converted into money, those persons may elect to take either. No other person can have any interest in the question.
4. ASSIGNMENT — QUIT-CLAIM DEED — TRUST. — An assignment by one devisee under a will of all his interest in the estate to another devisee, which was made to defraud creditors, is void, and no relief can be granted under it to either of the parties. A quit-claim deed made by one joint owner to his co-tenant, though absolute upon its face, will, if intended as a mere matter of convenience in making conveyances to purchasers of portions of the land, be treated as between the parties as a conveyance in trust only, and not as divesting the grantor of his interest in the land. Evidence to establish a trust in this case considered.
5. EVIDENCE — CONTEMPORANEOUS ACTS — DECLARATIONS AND WRITING. — Where the testimony of the parties in interest is directly in conflict as to the purpose and intent with which a certain quit-claim deed was executed, the conflict may be determined by a consideration of the corroborating testimony, and particularly by the acts, declarations and writings of the parties contemporaneous with the transaction in question.

In equity.

The complainant claims to be the owner of the undivided one-half of certain real estate described in the bill. It appears from the evidence that he claims to have derived his title thereto under the will of John L. Beadle, deceased, the material parts of which are quoted in the opinion.

Complainant insists that by this will the title to the real estate in question was vested in the complainant and the respondent, Michael Beadle. The principal object of the suit is to obtain a decree setting aside a certain quit-claim deed executed by the complainant to the respondent, Michael Beadle, and purporting to convey all the interest of the complainant in and to said lands; which deed was dated on the twenty-second day of May, 1871. The bill alleges that said deed was executed as a mere matter of convenience, and was not intended to convey a fee simple title to the said respondent; but that the respondent, at the time the same was executed, represented and promised that he would make and execute a writing under his hand which would show the cause of making such deed, and that the complainant still held an undivided one-half interest in said lands; but that the respondent has ever since refused and neglected to execute such writing, although often requested so to do. It is further averred that all the aforesaid representations were made by the respondent for the purpose of getting the title of said lands in his own name, to cheat and defraud the complainant, and that he took advantage of the great confidence that the complainant then had in him to accomplish such fraudulent purpose. It is further averred that the respondent never paid complainant any consideration for said deed, and that there was, in fact, no consideration therefor; also that the conveyance was in trust for the use and benefit of the complainant and not otherwise. And also that at the date of said deed and ever since said date, complainant has lived upon a part of said lands, has had the general charge and supervision thereof, saving at short intervals; that he is now in possession of the unsold part thereof, and has at all times accounted to the defendant for the profits thereof; that upon parts of said lands the complainant has made great improvements and expended large sums of money, amounting in the aggregate to about $6,000, to all of which the respondent consented; and that complainant made said improvements and expended said money believing that he had an undivided one-

half interest in said lands, and that said respondent knew all of said facts. It is further averred that since said deed was executed complainant has paid all the taxes on said lands, amounting to about the sum of $1,200, saving for the year 1874; that a large part of said lands has been divided into blocks and lots and are included with the town of Papillion, and that a large share of said lots has been sold and conveyed to third parties, and that the moneys arising from such sales have been received in part by this complainant and in part by the respondent; that complainant has at all times made due accounting to said respondent for all moneys received by him for such sales and retained a share for himself and transmitted a share to respondent; that respondent now proposes to sell all said lands not heretofore sold, including even the home of the complainant, and to appropriate the proceeds thereof to his own use, and has so notified complainant; that complainant has given his time and attention to said lands in keeping same in repair, and attending to the sale thereof, and doing sundry duties looking towards the advancement in value thereof, ever since the year 1869; that said services were and are worth the sum of one thousand dollars a year; and that he has expended large sums of money in and about said lands, and in making sales thereof, and in preparing the same for sale, and in making improvements thereon, and in paying taxes; and that he has at all times been willing to have an accounting thereof with said respondent.

The prayer of the bill is, that said quit-claim deed may be decreed to be cancelled and null; and that said respondent be ordered and decreed to execute to complainant a good and sufficient deed for the undivided one-half interest in all of said lands remaining unconveyed; and that the respondent be enjoined from making any conveyance, or incumbering the interest of said complainant in said lands; and that an accounting be had between the complainant and respondent as to said lands and proceeds arising therefrom and the expenses thereof.

The answer denies specifically all the allegations of misrep-

resentation and fraud set forth in the bill. It further denies that complainant has accounted at all times and truly with the respondent; denies that complainant has made improvements in the sum of $6,000, or any other sum, or has paid taxes. It sets out a copy of the will of John L. Beadle, bequeathing to the complainant herein and the respondent, Mishael Beadle, the lands in controversy after the payment of certain legacies, and avers that under said will the said Mishael Beadle and one Stephen Lapham were appointed executors; that respondent, Mishael Beadle, signed several notes as security for the complainant, upon which the latter obtained money to the amount of $2,950, which amount the respondent was subsequently obliged to pay, and which the complainant has never repaid. In consideration of said premises, it is alleged the complainant assigned to said respondent, Mishael Beadle, all his right, title and interest accruing to him in the lands in question under the said will. It is averred that at the time of said assignment said $2,950 greatly exceeded the value of complainant's interest in said lands. It is further averred that in 1871, the executors having paid all the legacies under the will of John L. Beadle, and the title having become thereby vested in the respondent, Mishael Beadle, and for the purpose of completing the title of the respondent, the complainant made the quit-claim deed referred to in the bill. It is further averred that on the twentieth of January, 1877, the parties hereto made and entered into a written agreement, a copy of which is set out with the answer, in which the title of the respondent, Mishael Beadle, is explicitly recognized and acknowledged. This answer, which was filed in the state court before the removal of the cause, contains a prayer that the respondent's said property may be cleared of whatever claim complainant may assert against it.

A large volume of testimony has been taken. The case was referred to the master, who reports his conclusions as follows:

First. That in 1862 the lands mentioned and described in

complainant's bill were owned in fee simple by one John Beadle, a brother of complainant and defendant.

Second. That said John Beadle in his lifetime duly executed his last will and testament, and thereby bequeathed to the complainant, David Beadle, and the defendant, Mishael Beadle (after the payment of certain legacies therein set forth), share and share alike, the real estate in the bill mentioned, together with other real estate.

Third. That said will provided that, "in the discretion of his executors at any time within ten years after John's death, the property described and chattels real be sold, and out of the avails of such sales and proceeds thereof, or any part thereof, there be paid certain bequests," amounting in the aggregate to the sum of nine hundred and fifty dollars.

Fourth. That in 1863 the said John died and said will was duly probated, and the executors, Mishael Beadle and Stephen Lapham, entered upon the execution of their trust.

Fifth. That in the year 1865 the complainant, David Beadle, entered into an oil speculation, and in the months of February and April the defendant, Mishael Beadle, signed notes for David amounting to about $3,100, which money was lost by said David in said speculations.

Sixth. That in the latter part of April, 1865, the complainant executed and delivered to Mishael the following paper:

"To all whom it may concern: Know that I, D. E. Beadle, of the town of Galen, Wayne county, New York state, for and in consideration of certain notes signed by Mishael Beadle as security for me, do hereby and by these presents assign and convey to the said Mishael Beadle all my right, title and interest in and to certain lands in the territory of Nebraska, acquired by me through the will of John L. Beadle, deceased.

(Signed) "DAVID E. BEADLE.

"Dated this first day of April, 1865."

Seventh. I find as a fact that said writing above set forth was not signed at the time it bears date, but afterward, and was antedated, and was given by David to Mishael to cover

up his Nebraska interests from his creditors, and was not intended as a sale or conveyance of his interest in the lands in controversy.

Eighth. I find that afterward, but at what exact time does not appear, the defendant Mishael paid the notes he had signed for David, the proceeds of which had been lost in the oil speculation, and had never been repaid.

Ninth. I find that in the year —— the complainant David, at the solicitation of the defendant Mishael, went upon the land in controversy, which was then wild and uncultivated, and devoted his time, or so much thereof as was necessary, to the improvement thereof, and that by and through his efforts the value of said lands was greatly enhanced, and said David continued with the exception of about —— months to have the care, management and improvement of said lands up to the commencement of this suit.

Tenth. I find that a portion of said lands were laid off into town lots and sold, a part of the proceeds being retained by David and a part paid to Mishael; but I am unable from the testimony to state the account.

Eleventh. On or about May 22, 1871, doubt having arisen as to the power of the executors under the will to make good title to the several purchasers of parcels of said lands, at the solicitation of Mishael, David made, executed and delivered to him the quit-claim deed mentioned in the pleadings, a copy of which is attached to defendant's answer and marked Exhibit "C," but no consideration was paid therefor, the same being made for convenience in making conveyances to purchasers and to enhance the interests of both parties.

Twelfth. I find that defendant Mishael paid or settled for all the behests or legacies under the will of John, but I am unable from the testimony to find whether any of the proceeds of the sales of said lands were used for that purpose or not.

Thirteenth. I find that David, being a half owner of the property, should be allowed in the settlement of his account against Mishael the sum of five hundred dollars per annum

for his services in securing the relocation of the county seat, railroad depot and the care, management and improvement of the property.

Fourteenth. I find as a fact that it has always been the intention of the parties that the moneys paid by Mishael in New York for David should be repaid by him, and out of the proceeds of this land.

I find as conclusions of law:

First. That upon the death of John the property in question immediately vested in David and Mishael, share and share alike, subject only to the payment of the debts and legacies in the will mentioned.

Second. That the assignment, or paper purporting to be an assignment, dated April 1, 1865, did not convey David's interest in the Nebraska lands to Mishael, and under the laws of Nebraska was void.

Third. That the quit-claim deed dated May 22, 1871, being without consideration, conveyed only the paper title, and Mishael held said lands in trust for the benefit of both.

Fourth. That a trust existing between the parties, the debt from David to Mishael, known as the oil debt, is not, in equity, barred by the statute of limitations.

Fifth. That both parties are entitled to an accounting of all property sold or disposed of, and of all moneys received or expended by either in and about said lands in complainant's bill described, and also the moneys advanced by Mishael to David in New York at the time of the execution of the pretended assignment before described, and of the services rendered by David in the improvement of the lands in question, and the enhancement thereof in value.

I do therefore find and report that a decree should be entered that all unconveyed lands mentioned in complainant's bill be, and the same are, held by the defendants, Mishael and Harriet Beadle, in trust under the quit-claim deed of May 22, 1871, as to the interest of complainant, David Beadle, and the injunction hereinbefore granted be made perpetual.

That a full, fair and perfect accounting be decreed between the complainant and defendant as to all matters touching the sale, care or management of said lands and lots, and the indebtedness existing between the complainant and defendant as hereinbefore set forth.

That the number of lots, the land, and any joint property there may be, remaining unsold and their value be ascertained, and upon the coming in of such report the same be divided as their interests may appear.

I respectfully refer to the transcript, cross-bill, answer, reply, the one thousand and eighty-two pages of bound testimony and exhibits therein referred to, the depositions of R. D. Hurlburt, D. E. Slauson, Henry Parks, John W. Travis, L. Garratt, John W. Beadle, Chas. D. Morgan, Geo. W. Cowles, Morris D. Beadle, Henry L. Parsons, I. S. Beadle, W. H. Closs, L. W. Sutherland, August-us Beadle, A. F. Allen, Mary M. Allen, and the records and files in case No. 304 D., between said complainant and defendant at law in this court, all of which were heard and considered on the hearing of this reference.

All of which is respectfully submitted.

DWIGHT G. HULL,
Master in Chancery.

LINCOLN, NEBRASKA, November 1, 1880.

To this report exceptions have been filed on behalf of respondents, and the case is now before the court on those exceptions.

Webster & Gaylord, for complainant.

Esterbrook & Hall, for respondents.

MCCRARY, *Circuit Judge*.— 1. We are to consider in the first place the question whether the complainant, David E. Beadle, derived title to the undivided half of the real estate in question under the will of John L. Beadle. The particular provisions of that instrument to be construed are the third

and fourth clauses. The third clause provides: "That after the payment of all debts as above provided for, all the rest and residue of my property resting in real estate (describing it), together with all other, the land and real estate or interest therein that I may have or hold in said county of Sarpy, in the territory of Nebraska, or elsewhere in that or any other territory, state or county on the face of the earth; that my said real estate and chattels real be sold by my said executors for the best prices that can be procured therefor either at public or private sale (or by the survivor of my executors), in their discretion, at any time within the space of ten (10) years after my decease, at such times as they shall deem best, and out of the avails of such sales and the proceeds thereof, or any part thereof, I give, devise and bequeath," etc. (naming various bequests to relatives, amounting in the aggregate to $950).

And the fourth clause is as follows: "And the rest and residue of my property and estate, real and personal, of whatsoever nature or kind, not hereinbefore disposed of and already devised and bequeathed (except the right and interest in a certain patent and invention hereinafter named), I give, devise and bequeath to my brothers, Mishael Beadle and David E. Beadle, to be divided equally between them, share and share alike, to have and to hold unto them, the said Mishael Beadle and David E. Beadle, and to their heirs and assigns forever."

Respondent insists that this will vested the title in the executors, and made it their duty to sell the land and convert the proceeds into personalty, and that therefore the will itself was a conversion, so that the land must be treated as personalty. This upon the ground that where a testator distinctly directs in his will that land shall be sold and converted into money, equity considers it as done. Story's Eq. Jur. secs. 791, 793, 1212, 1214; *Craig* v. *Leslie*, 3 Wheat. 563.

On the other hand, it is insisted by the complainant that these clauses of the will did not vest title in the executors; that they only authorized them to sell for the purpose of pay-

ing the several legacies named, and that by the terms of the will no equitable conversion was provided for or intended.

We must, if possible, construe the two provisions of the will above quoted so that both may stand; and there is therefore much force in the suggestion that it could not have been the intention of the testator by the third clause to *require* the sale by his executors of all his real estate, since by the fourth he bequeaths "the rest and residue" of his property and estate, both *real* and personal, to his brothers Mishael Beadle and David E. Beadle, the complainant and respondent herein. The fourth clause bears upon its face strong proof that the testator did not anticipate that all his realty would necessarily be sold by the executors under the previous clause. The fourth clause not only expressly devises the residue of the realty — thus assuming that there might be a residue of realty,— but it bequeaths the same "to have and to hold unto them, the said Mishael Beadle and David E. Beadle, and to their heirs and assigns forever," which is the phraseology usually employed in conveyances of real estate. In the light of these considerations let us look at the language of the third clause in the will. Does it convey the title to the executors or simply vest in them a naked power of sale? If the latter, then the title which could not rest in abeyance must have passed to the devisees subject to the right of the executors to sell. Upon this subject, Judge Redfield in his work on wills (vol. 3, p. 136) says: "It is often made a question whether the executor takes a fee simple under the will upon which his power to dispose of the same is engrafted, or a mere naked power to dispose of the title to the estate in a particular mode, in order to effect the purposes of the will." And in a note on page 137 the same author lays down the rule for determining the question in these words: "It is said the devise of the land to the executors to sell passes the title; but a devise that executors may sell, or shall sell lands, or that they may or shall be sold by the executors, gives them only a naked power of sale." Citing Sug-

den on Powers, 8th ed. 112; *Doe* v. *Shotter*, 8 Ad. & Ellis, 905.

Judged by this rule, it is clear that the will now under consideration did not vest the title in the executors. There are no words of conveyance or devise to them. The language is, "that my said real estate and chattels real be sold by my executors," etc. He does not say, "I give and bequeath to my executors," etc., nor does he use any equivalent language.

There are certainly no words expressly passing the title to the executors, and since the purpose of the testator is secured as well by treating the instrument as conferring only a power of sale, and since by this construction all the provisions of the will may be harmonized, I adopt it. Another consideration has great weight with me in determining the true construction of this will. It is conceded that all the legacies provided for in the will, to be paid out of the proceeds of the sale of the land, have been paid in full. The legatees are therefore satisfied, and there is no one to claim the property as personalty. The complainant and respondent both claim realty under the will. They have both elected to claim the realty, as their pleadings in this case abundantly show. The complainant sues as devisee and claims title under the will. The respondent claims title in himself by virtue of the will and a conveyance from complainant. He sets out the will as a part of his answer and as the source of his title, and prays that his title may be quieted. The legacies having been paid, it is clear that the whole beneficial interest under the will, whether that interest be in the land or in the proceeds of a sale thereof, is in the same parties; that is to say, in complainant and respondent jointly, or respondent solely; in both if complainant succeeds in this controversy, in the respondent if he is successful. Now, the law is well settled that where the same person is to receive the bequest, whether it remain in the form of realty or be sold and converted into money, that person may elect to take either. This for the reason that no other person can by possi-

bility have any interest in the question. It is only in cases where, if the property be treated as realty, it will go to one party, and if regarded as personalty, to another, that questions arise requiring the intervention of courts and the application of the principles contended for by the respondent. Courts of equity cannot be called upon to hear and determine controversies concerning purely abstract questions, and which do not involve substantial rights. If the same result follows a decision either way, there is nothing with which a court ought to be troubled. A court of equity will not compel a trustee to execute a trust against the wishes of the *cestui que trust*. If the latter is entitled to the land, or its proceeds if it be sold, the court will allow him to take his choice. This rule is settled by the case of *Craig* v. *Leslie*, *supra*, and by a uniform current of authority in this country and in England.

My conclusion upon this branch of the case is, that by the will the title was vested in the devisees, and not in the executors; and I proceed to consider the other questions presented in the case.

2. We are next to consider the force and effect of the following instrument executed by complainant to respondent:

"To all whom it may concern: Know that I, D. E. Beadle, of the town of Galen, Wayne county, New York state, for and in consideration of certain notes signed by Mishael Beadle as security for me, do hereby and by these presents assign and convey to the said Mishael Beadle all my right, title and interest in and to certain lands in the territory of Nebraska, acquired by me through the will of John L. Beadle, deceased.

"Dated this first day of April, 1865.

(Signed) "DAVID E. BEADLE."

The bill in this case is not filed for the purpose of setting aside the assignment; it is aimed at the quit-claim deed subsequently executed. It is, however, insisted on behalf of respondent, that this assignment and the said quit-claim deed are parts of the same transaction; that both were executed for the same consideration and for the same purpose, viz.: to vest

in respondent the title to the land absolutely and unconditionally.

It is further insisted that if it be found that the purpose of this assignment was to defraud the creditors of complainant, then he cannot be heard to attack it, and that the same must be held with respect to the quit-claim deed afterwards made in consummation of said assignment.

Whatever may have been the purpose of this instrument, it is very clear that it was not intended by the parties as a conveyance of all the interest of complainant in the real estate, and that it was not after its execution treated by them as having any such purpose or effect. After its execution the respondent continued in various ways to recognize the interest of complainant in the land, and to consult him from time to time with respect to sales thereof and its management generally. In numerous letters addressed to complainant, he speaks of the land as "ours," as "our property," and "our land," etc., and in several written long after the assignment, he speaks of the respondent's "interest" in the land and of his "part" thereof, and in one he speaks of an expected *settlement* and *division* between them. Without quoting in this connection from these letters, it is sufficient to say that they cannot be harmonized with the theory that the assignment was intended or understood as divesting complainant of all interest in the land. To construe that instrument as having been given as a security in the nature of a mortgage to indemnify respondent against loss on account of his indorsement of the notes of complainant, would do no great violence to its terms; but the master has found, and I think correctly under the evidence, that the assignment was executed by complainant for the purpose of covering up his Nebraska interests as against the claims of his creditors. This makes it necessary for us to consider the question whether complainant is estopped to recover in this case upon the ground that he is asking relief as against his own fraudulent act. The well settled rule is that no affirmative relief will ever be granted

upon a fraudulent contract to either of the parties thereto. If it be true that complainant is asking this court to set aside this assignment, or that the assignment is so clearly identified with the quit-claim deed that they must be regarded as parts of the same transaction, then, in either case, I would have no hesitation in saying that he is not entitled to relief. The same result, however, would follow as to respondent. He was a party to both instruments and was *in pari delicto*. If they were fraudulent, he too was a party to the fraud and can claim nothing under either of them. The court would in that case refuse relief to either party and leave them in precisely the position in which they have placed themselves. *Western Union Telegraph Company* v. *Union Pacific Railway Company*, 1 McCrary, 418, and cases cited.

If, therefore, the assignment and the deed are to be regarded as parts of the same fraudulent scheme to defraud the creditors of complainant, it would inevitably follow that both would be treated as absolutely null and void, and the parties would be left as between themselves, without any right to a decree to enforce or set aside either the one or the other. This result would be much more injurious to the interests of respondent than to those of the complainant, since the latter is in possession; and if the two instruments are ignored, he can as against respondent hold the undivided half of the land — all that he claims — under the provision of the will of John L. Beadle. But I am of the opinion that the evidence does not sustain the position of respondent, that the assignment and the quit-claim deed are parts of one and the same transaction, both executed for the same consideration and for the same purpose. Upon this question, as upon nearly all the disputed questions of fact in this case, the testimony of the complainant and respondent is in direct conflict. They are equally interested, and, so far as appears, equally intelligent and credible. I conclude, therefore, that the matters of fact in controversy between them, and concerning which their testimony is in conflict, must be determined by a consideration of the corroborating testimony,

and particularly by the acts, declarations and writings of the parties contemporaneous with the transactions in question. What was said and done by the parties in connection with these transactions at the time they were transpiring and before any ill will had arisen, may be relied upon as exhibiting a reliable indication as to their aims and purposes.

For what purpose was the quit-claim deed executed? Complainant swears that it was for the purpose of simplifying the title and making it more satisfactory to purchasers of lots, who objected to the title made by the executors without an order of court. Respondent swears that there was no such purpose; but that on the contrary the object was to invest him with the fee simple title, absolutely and unconditionally. This dispute can best be settled by reference to the correspondence between the parties which preceded and led to the execution of the deed; and this settles it very satisfactorily in favor of complainant. I do not find in this correspondence a single allusion to the assignment which had been executed four or five years before, and apparently ever since entirely ignored. I do find, however, the reason for the execution of the quit-claim deed clearly and repeatedly stated in this correspondence by the respondent himself. In a letter dated December 12, 1869, respondent expresses his surprise that the title was questioned, or that there was anything more to be done, and goes on to propose a plan for arranging the matter and satisfying purchasers. He proposes to pay the legatees, get their receipts in full, and then adds, "I see no other way but you must quit-claim to me your interest in the will. I have already assumed all the debts, and that settles up the estate and leaves the title in me individually. Then as soon as we can sell enough to pay these debts we can settle and I will deed you your part; all the trouble there is, is in your trusting me until we can do so. We can then do without the other executor." It is impossible to believe that the respondent would have used this language if the parties had understood that complainant was to execute the deed in con-

summation of the assignment and to have no interest thereafter. This letter demonstrates that the quit-claim was asked for upon quite another ground, to wit: that the estate should be closed, the legacies and debts paid, the title vested in one person who could make deeds, and afterwards a settlement and division could be made as between the two brothers to whom the land had been devised. In a later letter on the same subject respondent writes to complainant, "You can quit-claim your interest in the will. Trust me, it shall be all right." In still another letter (not dated), respondent writes to complainant, "I will pay the expense if you quit-claim your interest in the will; it will be easier for me to settle with the surrogate, for then he will not have to look after your interest. *That will be between you and me to do.*"

Other letters contain similar language. In no one of them is it intimated that respondent is entitled to the quit-claim as a matter of right, or as the real owner of the property, or because of the assignment of 1865. If the negotiations had been conducted upon the basis of his entire and unconditional ownership, as now claimed by respondent, the correspondence would have given some expression or suggestion of such an understanding or of such a claim. We find nothing of the kind; but on the contrary, repeated and explicit declarations showing that such was not the intention of the parties. I conclude, therefore, that the quit-claim deed was not executed for the purpose of making effective the previous assignment; that it was the result entirely of negotiations arising subsequently to the assignment and having no connection therewith, and that therefore the parties are not estopped by the fraudulent character of the assignment to contest in this case the validity or the force and effect of the quit-claim.

This brings us to the question whether the said quit-claim deed was in equity an absolute and unconditional conveyance of all the interest of complainant in the land, or a conveyance as between the parties in trust, made for convenience, and leaving the respondent bound to account for proceeds of sales,

and to reconvey upon final settlement any interest of complainant's remaining in the land. This question has been to some extent anticipated in what has been said. We have seen that the deed was executed for the purpose of facilitating the conveyance of portions of the property to purchasers by vesting the legal title fully in respondent. The quotations already made from the contemporaneous correspondence between the parties shows this.

This conclusion is confirmed by the acts and declarations of respondent subsequently to the execution of the quit-claim deed. He did not assume to be the owner of the property. He did not claim possession nor deny the right of the complainant. On the contrary, he went on assuming that the two were still jointly interested. Perhaps the most conclusive proof upon this point will be found in the letter of the respondent which is in evidence, marked Exhibit "R," in which he says:

"This satisfaction piece and your quit-claim being recorded, there will be no question in my giving a warranty deed; and just as soon as we can sell and pay some of the debts resting on me, we can settle and divide, or hold it together, just as we are a mind to. I see nothing to hinder if you are satisfied to do so."

It is clear that the execution of the quit-claim deed under the circumstances developed in the proof did not divest complainant of his interest in the lands devised under the will, but said interest was vested in respondent only in trust, and he was bound in equity to account to complainant therefor.

3. It remains only to consider the effect of the contract, a copy of which is attached to the answer, dated June 20, 1877. By this instrument the respondent agreed to furnish "good and sufficient warranty deeds" for the land in question, when called upon by complainant to do so, as he should sell or dispose of lands. Complainant was to pay respondent $11,000 for his interest, the whole amount to be paid within five years; and to pay at least $600 per annum, together with all money

or securities received for the sale of said real estate. Whenever $2,000 was paid the complainant was to have a deed for the house and block upon which he resided. By reference to the pleadings it will be seen that neither party is seeking in this suit to enforce this contract. It seems to be assumed that it has been abandoned and rescinded by the parties to it. It seems pretty clear that it was repudiated by the respondent as early as the fifteenth of March, 1878; for on that day he wrote to complainant that he was resolved to sell the land and the buildings and would want possession when he made a deed. The time for carrying out the contract had not expired, and this notice could have been given only upon the theory of an abandonment of the contract.

It is, however, enough for the present to say that the court is not asked to specifically enforce it. It is offered in evidence only as tending to establish the claim of the respondent to the entire ownership of the real estate. It contains a reference to the land as "now owned by" Mishael Beadle; but this recital is not, in my judgment, sufficient to overcome the proof already referred to establishing the fact that he did not, in fact, own the whole of said land.

Upon the whole case my conclusion is, that all the exceptions to the master's report, by both parties, should be overruled; and that the said report should be confirmed and decree rendered as recommended. It is accordingly so ordered. The case will be recommitted to the master to state an account in accordance with his findings, and with power to take further testimony touching the matter of the account between the parties.

Burr *v.* Chariton County.

(Western District of Missouri. November, 1880.)

1. Municipal Bonds — Validity — Charter — Special Act. — Where the charter of a railroad company authorized it to receive subscriptions to its stock from a county without a vote of the people, *held*, that a prior

special act of the legislature, requiring a vote of the taxpayers as a condition precedent to such subscription, did not affect the validity of bonds in the hands of innocent purchasers.

2. INNOCENT HOLDER OF MUNICIPAL BONDS.—The bonds having passed into the hands of innocent holders, it is enough if the power to issue them existed either under the charter or special act. The question whether the statute has been complied with, is for the authorities of the county to determine.

Henderson & Shields, for plaintiff.

C. W. Bell and *C. L. Dobson*, for defendant.

KREKEL, *District Judge*.—The legislature of Missouri, on the twentieth day of February, 1865, granted a charter to the Mississippi Railroad Company, to which defendant county in 1869 issued bonds in payment of a subscription of stock made thereto. This suit is brought on due and unpaid coupons of said bonds. The bonds issued are made payable to said railroad company or bearer. It appears that at the time of granting the charter and at the time of issuing the bonds, there existed a special act applicable to the defendant county, providing that whenever the county of Chariton wishes to subscribe to the capital stock of any railroad company, the county court shall cause an election to be held, and if a majority of all the resident taxpayers of said county shall vote for the subscription, the county court shall subscribe. The county court is prohibited by the act from taking stock unless the subscription was voted for by a majority of all the resident taxpayers.

It is claimed that because the proceedings which led to the subscription and issuing of the bonds were not had under this special act, but under the provisions of the charter, the bonds are therefore void for the want of power in the county court to make the subscription and issue the bonds. The bonds on their face recite that they were issued under the authority conferred by the charter of the company. The question whether this special act of March 12, 1859, relating to defend-

ant county, was in force at the time of the issuing of the bonds, I shall not stop to discuss, holding that even if it was in force it does not affect the legality of these bonds. The charter of the Mississippi Railroad Company granted to it the privilege to obtain county subscription, and the defendant county could avail itself of the opportunity to subscribe either under this power or the power granted by the special act, assuming that the latter was in force. It can scarcely be doubted that the legislature of Missouri had the power to except this railroad company out of any limitation which might have existed by virtue of the special act. Aside from all this, it has been held that the issuing of the bonds raises the presumption that all preliminaries, including the election required, have been complied with, and a *bona fide* holder is not bound to look beyond the question of power. *City of Lexington* v. *Butler*, 14 Wall. 283; *Flagg* v. *Palmyra*, 33 Mo. 440. There is an abundance of power, as claimed by either party, to issue bonds. The recital in the bonds that they were issued under authority granted by the charter might be erroneous, yet if the special act authorized the issuing of them, that is sufficient. The question is, did power exist? Whether the source thereof was correctly pointed out can make no difference. But it is said that the provisions of the special act define who shall vote, and that these have not been complied with. The answer is, that the tribunal, the county court, was by law made the judge of such matters, and when they issued the bonds innocent holders had a right to presume that all preliminary requirements had been complied with. The objections urged against the validity of the bonds are not that there was no power to issue them, but that no power existed under the charter, because the special act limits the power there granted. The defendant county urging this objection can only do so on the assumption that the special act is in force. If so, there existed power to issue the bonds, and the same having been issued, the law will attribute the exercise of the authority to the true source in the furtherance of justice and good faith. Eight years of interest have been

paid on these bonds, thus affirming their validity and curing irregularities, so far as such acts tend in that direction. The law of the case arising upon the facts is with the plaintiff, and judgment accordingly.

MERRIAM *v.* LAPSLEY.

(Western Division Western District of Missouri. October, 1880.)

1. CONTRACT BY CORRESPONDENCE — ACCEPTANCE OF PROPOSITION.— Where it was alleged that a contract for exchange of property had been consummated by correspondence, and it appeared that the final letter of complainant, in which he claims to have accepted the proposition of respondent, contained a condition to which respondent never assented, *held*, that there was no consummated contract; that, though the condition might have been of small importance, yet the respondent had a right to an unconditional acceptance of his proposition before being bound.

The facts are stated in the opinion.

KREKEL, *District Judge.*— Bill for specific performance. This case comes here by change of venue from Cass county, Missouri; and in a controversy between Merriam, a resident of Pleasant Hill, Cass county, Missouri, and Lapsley, a resident of the state of Kentucky, plaintiff Merriam claims that he agreed with defendant Lapsley to exchange certain improved real estate in Pleasant Hill, Cass county, Missouri, owned by defendant, for improved real estate in the state of Kansas, owned by Merriam. The transaction commenced by Merriam writing to Lapsley, offering to exchange his Kansas lands for Lapsley's Pleasant Hill house and lot. A correspondence is thereupon had, and it is claimed by Merriam in his bill that an agreement was reached, under which he took and now holds possession of the Pleasant Hill property. All the information Lapsley ever had regarding the Kansas lands of Merriam came from Merriam through letters in evidence. It seems that Lapsley, under an erroneous impression regarding the location of the land as to railroad improvements, expressed

himself at one time willing to exchange, and so wrote Merriam; but soon after writing and mailing his letter, discovered his mistake, and wrote withdrawing his proposition. This letter of withdrawal did not reach Merriam until after he, as he claims, had accepted Lapsley's proposition, and so advised Lapsley by letter. Had this letter of acceptance on part of Merriam been unconditional, the case under all the evidence and the law, as found in the adjudicated cases, would have been in favor of plaintiff. But the letter of acceptance is not an unconditional one, but in it occurs the following language: "I have some rails or posts, or both, which Mr. Sutton (the agent of Merriam) wrote me about selling, which I think were near the stable, which I reserve. He also wrote me there were a good many peach trees that would be wanted this spring, and I told him to sell them, where they were too thick, for two cents apiece, and have them thinned out, but of course if any trees sold after this time, the sale will belong to you." Thus it appears that Merriam not only makes reservations not mentioned in any of his former correspondence spoken of, but seems not to have known even himself what had been done under his instructions regarding the sale of peach trees, a matter which Lapsley was entitled to know in order to determine for himself whether he would take the land after he had been advised of the condition of things. These may appear slight deviations or conditions, but are proper to be seized upon by the chancellor to prevent injustice. The whole case under the evidence presents one in which one party acts with full knowledge as to his own property as well as the other property for which he is bargaining, while the other, on account of non-residence, can scarcely be said to know his own property, and who knew nothing whatever of the property he was trading for. Under such circumstances Merriam is held to the strictest and fullest disclosures. While it cannot be said that plaintiff made direct misrepresentations (for the value put upon his Kansas land, and the value thereof testified to by others, may be said to be within the range of allowance by

one who estimates the value of his property in a trade), yet the description of the land, and especially of the improvements, when examined under the testimony in the case, is well calculated to impress the mind more favorably than the facts testified to would do. The hasty and somewhat extraordinary manner in which plaintiff took possession of the property of defendant, without awaiting a reply to his conditional letter of acceptance, is well calculated to leave the impression that he largely relied on getting hold of the property in overcoming any obstacles to the consummation of the trade which might be imposed, thus anticipating, as it were, what has occurred. On the whole, I am well satisfied that the equity is with defendant, and the judgment of the court will be that plaintiff deliver up the possession of the premises to Lapsley on or before the first of June next; that an account of the rents, repairs and payment of taxes be taken, so that judgment may be rendered in this regard for a specific and proper amount.

Erwin *v.* St. Joseph Board of Public Schools.

Osborne *v.* Same.

(Eastern Division Western District of Missouri. November, 1880.)

1. Charter Construed — Power to Issue Bonds. — The charter of the St. Joseph Board of Public Schools gave the board power "to purchase, receive and hold property, real and personal, to lease, sell or dispose of the same, *and do all other acts as natural persons*," and also "generally to do all lawful acts which may be proper and convenient to carry into effect the objects of the corporation." *Held* that these provisions, when considered in connection with the whole act, did not authorize the board to create a debt for building a school house and to issue bonds to pay the same.
2. Same — Power to Raise and Collect Taxes. — Where the charter of a school board authorized it to make an annual estimate of the amount of money to be raised for the purpose of building, repairing and furnishing school houses, and required the county court to cause the same to be levied and collected upon all taxable property in the school district, *held*, that this provision was a limitation upon the power of the board regard-

ing the building of school houses, and did not authorize the board to create a debt for that purpose and issue bonds for the payment thereof.

The facts appear in the opinion.

Woodson & Crosby, for plaintiff.

Flanagan, for defendant.

KREKEL, *District Judge.*— These suits are instituted on detached coupons of the same issue of bonds emitted by the St. Joseph Board of Public Schools.

The question to be determined is, had the board authority to issue them? The bonds declared on are in the following form:

"No. ——. UNITED STATES OF AMERICA. $1,000.

"State of Missouri, City of St. Joseph.

"The St. Joseph Board of Public Schools of the city of St. Joseph, in the county of Buchanan, in the state of Missouri, being legally organized and assembled, do hereby acknowledge themselves indebted to —— ——, or order, in the sum of one thousand dollars, which said sum they bind themselves and their successors in office to pay the said —— ——, or order, on or before the first day of April, 1888, at the National Bank of Commerce in the city of New York, and interest thereon from April 1, 1868, at the rate of ten per centum per annum, payable half-yearly on the first days of April and October, on presentation of the proper coupons hereto annexed. Reserving to themselves and their successors in office the right of paying this bond with the interest thereon at any time after the expiration of ten years from the date hereof. This bond is secured by the real and personal estate owned and held by the said board of public schools in the city of St. Joseph in their corporate capacity, in conformity with the Revised Statutes of Missouri for the year 1865. In testimony whereof, the said board of public schools have caused their corporate seal to be hereto affixed, and their president and secretary of the said board to sign their names to the same, and

also the treasurer to countersign the same, this first day of April, A. D. 1868.

(Signed) "SAMUEL HAYS, President.

[SEAL.] "EDWARD B. NEELEY, Secretary.

"JOHN CALHOUN, Treasurer."

The petition is the usual form, and alleges that the bonds were issued "with others, in accordance with and by virtue of the authority vested in the defendant by its charter of incorporation, and the acts of the general assembly of the state of Missouri amendatory thereto, for the purpose of raising money to build school houses, and twenty installments of interest have been paid thereon." It is not pretended that there is direct authority in any of the laws under which these bonds were issued, to which reference will hereafter be made, to issue the same, but it is claimed that from the nature of the grant of power in the charter, implied power authorizing the issue can be deduced; that on account of the object and purposes of the corporation, a liberal construction, in harmony with the tendencies of legislation in Missouri regarding schools, should be indulged in; that if any doubt regarding the proper construction of the law exists, the construction given to it by those whose duty it was to carry out the law should prevail; that the acquiescence of the people of St. Joseph for more than ten years, indicated by the payment of the interest on the bonds, and the furtherance of honesty should incline the court to uphold the bonds.

We proceed to examine the laws under which the bonds were issued. The St. Joseph Board of Public Schools was incorporated by an act of the legislature of Missouri, approved January 4, 1860, and from this act, its amendments and laws incorporated into it, we proceed to quote such portions as are relied on by the plaintiff, and citing other parts having a bearing on the case.

We are directed in the first place, by plaintiff's counsel, to that portion of the first section of the charter which provides that the board may "do all other acts as natural persons."

The first section, from which this quotation is taken, defines the boundaries of the corporation, gives it its corporate name, confers perpetual succession, authorizes it to sue for and be sued, and proceeds, "may purchase, receive and hold property, real and personal, may lease, sell or dispose of the same, and do all other acts as natural persons." Very many acts must of necessity be done in connection with the execution of the powers here granted; and the natural construction of the language, "and do all other acts as natural persons," must be construed to mean the doing of the acts embraced within the powers granted but not specified. Corporations obtain powers by grant exclusively, and from their thus limited character can claim such implied powers only as are *necessary* to carry out the obvious object and intention of the charter. Especially is this true in cases where the act of incorporation, when properly construed, provides for the very contingencies which are claimed to have existed, creating a necessity for the exercise of implied powers.

Upon another branch of the case something more will be said on this point.

The next point to which our attention is called by plaintiff's attorneys is, the concluding portion of section 5, which reads as follows: "And generally to do all lawful acts which may be proper and convenient to carry into effect the objects of said corporation."

The fifth section, from which this quotation is extracted, grants the powers which the corporation is to exercise, namely: Provide for the election of its members, compel attendance at meetings, expel members, make rules for the proceedings of the board, control the schools and property of the corporation, to loan its moneys and their proceeds; and provides, "the board shall also have power to make rules, regulations and ordinances necessary for the management and control of the property belonging to the corporation, and for the government, discipline and other management of the schools under their charge, so that the same shall not be inconsistent with the

laws of the land, and generally to do all lawful acts which may be proper and convenient to carry into effect the objects of said corporation."

Much of what has already been said regarding the construction of such language as is here employed applies to the provision cited; but it is insisted that the words, "to do all lawful acts which may be proper and convenient to carry into effect the objects of the corporation," when viewed in connection with the provision in the first section, "to do all other acts as natural persons," has peculiar significance, and may well be construed to authorize the creation of a debt for school purposes and the issuing of bonds therefor. On the words "proper and convenient" great stress is laid in the argument. What do these words when read in their connection mean? The answer is, they suggest the exercise of caution in the doing of the manifold acts which a board of directors is called upon to perform in the management of its schools. The building of school houses, under the view taken by plaintiff's counsel, is claimed to have been not only proper and convenient, but necessary to carry into effect the objects of the corporation. There must necessarily be some limitation, some boundary as to what may be proper and convenient. Has the charter left the fixing of this boundary to the discretion of the board, or defined it? We think it has clearly and indisputably defined and limited it in the fourteenth section of the act of incorporation, which is as follows: "The board shall cause an estimate of the amount of money necessary to be raised for the purpose of building and repairing school houses and furnishing the same, together with the amount necessary to meet the other expenses of the corporation, to be made out and certified under the seal of the board annually; and a copy of such estimate duly authenticated shall be filed with the clerk of the county court of Buchanan county on or before the first Monday in each year, and the county court shall cause the same so certified to be levied upon all taxable property, real and personal, in said district, and the amount so levied shall be col-

lected in the manner prescribed by law for the collection of state and county taxes; provided the taxes mentioned in this section shall not exceed one-fifth of one per cent. (amended by the act of 1869, and made one-half of one per cent.). It is scarcely possible to draw a clearer provision of law defining the limits within which any discretion regarding the building of school houses and other expenditures for school purposes in St. Joseph should be exercised by the board. But it is argued that the tax limitations were such as not to produce a sufficient amount of revenue to build and pay for the number of school houses necessary, proper and convenient. How can this be said in the face of the fact that the people of St. Joseph had in a measure, by and through their charter, determined this very question. If we were to approve the view taken by the board, where, it may be asked, are there limits to the implied powers of the St. Joseph school board? The board may issue one hundred thousand or a million of dollars of bonds. We would be bound to hold the issue of the one amount as well as the other to be valid; and would further be bound to cause the taxes to be collected to pay the interest and principal when due for whatever amount the board saw fit to issue the bonds. There is a vast difference between building or purchasing school houses and the appointed revenues of the district, and the making use of the credit of the city by issuing bonds and using them for that purpose; the one leading to prudence and caution in expenditure, the other tending towards extravagance and going beyond the real wants of the city. There is scarcely any use in providing limitations to the exercise of powers in laws or charter if they can be evaded under the guise of implied powers. I fully concur in the reasoning on this subject in the case of *Gauss* v. *Clarksville*, 19 Albany Law Journal, 253.

It will not do to substitute discretion, however soundly exercised and however laudable the object, for law; and especially not in construing charters of corporations. But the charter under consideration has in its twenty-third section

this provision: The legislature, after reserving the power to change, alter and repeal the charter, goes on to provide, "that no law hereafter passed shall be construed as changing, altering or repealing the whole or any part of this act, unless this act be expressly mentioned in such law."

Laws authorizing the creation of debts and the issuing of bonds therefor for the purpose of building school houses, passed after the charter and amendment thereof in 1866, and after the issuing of the bonds in controversy, can have no bearing on this case.

We have examined with care the amendments of the original charter in 1866, and the town and village school law of 1855, made a part of the original charter.

In the amendment of 1866 no trace of authority is found authorizing the creation of a debt for the purpose of building school houses, much less the issuing of bonds therefor. By the ninth subdivision of the twenty-second section of the town and village school act of 1855, granting powers to school boards, the right is given them: "To determine the number of common schools to be kept; to designate and lease or purchase sites for school houses. Tenth. To build, hire or purchase school houses, and keep in repair and furnish the same with fuel, furniture and necessary appendages. Eleventh. To appropriate and apply such part of the town or village school moneys as may be necessary to the purchase or lease of sites for school houses, to the building, hiring, keeping in repair and furnishing school houses with fuel, furniture and appendages."

It will be observed that here, as in the charter, not only is there no authority to create a debt to build school houses, but on the contrary the creation of a debt is implicitly denied by the provision that such part of the town and village school moneys as may be necessary for the building, hiring, keeping in repair school houses shall be applied for that purpose.

The conclusion reached against the power to issue the bonds in suit is fortified by the subsequent legislation of Missouri, which expressly gives the power to issue school bonds.

The power to create a debt, and the issuing of commercial securities therefor, are quite different things. The ordinary evidence of corporate indebtedness, such as warrants, orders, notes, are subject to legal and equitable defenses. This being known, induces prudence in their issue and caution in receiving them. Once allow such debts to be put in the shape of commercial securities, preventing all inquiry in the hands of a *bona fide* holder except that of power to issue, and you open the doors wide, indeed invite the commission of fraud, and point the way to its successful accomplishment.

As to the argument that a construction given by those who had to execute the law, and the acquiescence in such construction by paying taxes on the bonds for a long period of time, it is sufficient to say that we are precluded from making inquiry, for the supreme court of the United States has again and again decided that such acts cannot cure the want of power, and have held the bondholder to strict inquiry regarding its existence.

The conclusions reached are, that the St. Joseph Board of Public Schools had no power under its charter, nor the law of 1855, regarding towns and villages, made part of the charter, to issue the bonds, the coupons whereof are in controversy, and that the demurrer to the petition must be sustained. Ordered accordingly.

Henderson *v.* Jackson County.

(Eastern Division Western District of Missouri. November, 1881.)

1. Constitutionality of Statute Attaching Certain Territory to the Town of Westport for Certain Purposes.—The act of the general assembly of Missouri, entitled "an act attaching certain territory to the town of Westport to enable said town to take stock in a railroad," approved March 18, 1871, is constitutional. It is not an act to authorize a municipal corporation to tax for its own local purposes lands lying beyond its own corporate limits.
2. Same—Title of Act.—The act above named is not void by reason of a failure to comply with that provision of the constitution of Missouri

which provides that every law enacted shall relate to one subject, and that shall be expressed in the title.

3. Power to Issue Bonds under Act of the Eighteenth of March, 1871.—The act of the general assembly of Missouri of the eighteenth of March, 1871, above cited, authorized the town of Westport to subscribe to the stock of a horse or street railroad, and to levy a tax upon the real and personal property within a certain district for the payment of such subscription. It further provided that "said district in subscribing to a horse or street railroad company, and in voting taxes to be levied for the same, shall be governed by the law regulating the subscription to railroad companies of municipal townships." This latter act authorized the issuing of bonds. *Held*, that the whole act construed together, and embracing as it does the provisions of the township aid act referred to, authorized the issuing of bonds as well as the voting of a tax.

Joseph Shippen, for plaintiff.

Comingo & Broadhead, for defendant.

Krekel, *District Judge*.—This suit is brought upon coupons detached from bonds issued by the county of Jackson to the Kansas City & Westport Horse Railroad Company or bearer. The bonds are in the usual form, and recite that they are issued "pursuant to an order of the county court of Jackson county made at the June term, 1871, of said court, and authorized by a vote of the people of the district hereinbefore described, by virtue of an act of the general assembly of the state of Missouri, entitled an act attaching certain territory to the town of Westport to enable said town to take stock in a railroad, approved March 18, 1871."

The agreed statement of facts filed in the case shows that on the seventeenth day of April, 1871, the county court of Jackson county, on petition of forty-seven citizens and taxpayers of the district, established by the act of the eighteenth of March, 1871, made an order for an election submitting to the voters of the district a proposition to subscribe $25,000 to the capital stock in the Kansas City & Westport Horse Railroad Company in bonds; that an election was held on the sixteenth of May, 1871, and that two thirds of the qualified

voters voted in favor of the proposition; that the amount of stock voted was subscribed; that no stock certificate was issued, but that such issue on demand was refused by the horse railroad company; that Jackson county never voted the stock; that the stock was sold and assigned by Jackson county for $12,000, which was applied in payment of part of the $25,000 of bonds issued first falling due; that the county court levied and collected taxes for a number of years in the district to pay the interest coupons, and that the same were paid for the years 1872, 1873 and 1874; that no levy of taxes has taken place since; that the bonds were issued under the acts of March 23, 1868, and March 18, 1871, and were received by the horse railroad company, and the proceeds thereof applied to the construction of the road; that the plaintiff is a *bona fide* holder without notice.

Two questions are raised and relied on as defenses. First, the unconstitutionality of the act of March 18, 1871; and next the want of power under the law to issue bonds by Jackson county for the newly organized district.

Regarding the constitutionality of the act we are first referred to the case of *Wells* v. *The City of Weston*, 22 Mo. 384, in which the supreme court holds that the legislature cannot authorize a municipal corporation to tax for its own local purposes lands lying beyond the corporate limits.

Regarding this decision, it is only necessary to say that there is no attempt made on part of the legislature in the act under consideration to authorize the town of Westport to levy a tax outside of its corporate limits for its own local purposes, but the intention of the law is to erect a district of which the town of Westport itself is to be a part. The taxes to be levied are to be levied on the property of the district, and for the use and purposes of the district, so that the case cited, admitting it to be good law, has no application.

A more serious question arises here as in the strip bond cases, namely, can the legislature, for the purpose of enabling the people occupying a designated territory to aid in public

improvements, erect them into a *quasi* corporation and authorize them, or the county for them, to issue bonds? In the case of *Ogden* v. *Davies County*, decided in this court, among other questions the one here suggested was considered, and the conclusion arrived at, that there existed no constitutional prohibitions in Missouri against the exercise of the power claimed. In the case mentioned a strip of country had been designated on each side of the Platte City & Fort Des Moines Railroad, authorizing those residing within the strip to vote and subscribe stock. This was done in part of Davies county through which the railroad passed. Bonds were issued and litigation arose about them, and though the case was decided against the bondholders and the validity of the bonds, it was upon other grounds than the one under consideration. The judges were opposed in their opinion on a number of questions, and on account of the doubts prevailing with the judges the case was certified to the supreme court of the United States, where the case is now pending.[1] As now advised, it is held that the legislature of Missouri had power to attach outside territory to the territory of the town of Westport, and erect the territory so attached, together with the territory of the town, into a district, and authorize the district so formed to vote stock and issue bonds in payment thereof. Whether it did so, and under what limitation, will be considered after disposing of another constitutional question raised.

[1] Since this opinion was written the case here referred to has been decided by the supreme court of the United States, that tribunal holding that the seventh section of the act of the general assembly of Missouri, approved January 4, 1860, incorporating the Platte City & Des Moines Railroad Company, authorized the county court to levy, collect and pay over taxes voted by the inhabitants of a strip of country through which the railroad passed, and in a case where the act had been complied with; but that there was no authority under that act to issue bonds in anticipation of the tax. *Ogden* v. *County of Davies*, 102 U. S. 634. That act, however, contained no language even impliedly authorizing the issue of such bonds, and the case is, therefore, not conclusive of the true construction of the act discussed in the present case, since the latter does contain provisions under which it was held that the issue of bonds was authorized, if not expressly, by necessary implication.

The constitution of 1865, in force when the act under consideration was passed, provided that every law enacted shall relate to one subject only, and that shall be expressed in the title. The title of the act of March 18, 1871, is "an act attaching certain territory to the town of Westport to enable said town to take stock in a railroad." It is argued that if the intention of the act was to erect a district, then the title of the act fails to specify its object. What was in the legislative mind at the time of the passage of the act must be gathered from what was sought to be accomplished. A certain territory lay between the corporate limits of Kansas City and Westport. The horse railroad, for the purpose of connecting these places, was to run over this territory. Whatever of benefits were to accrue from the improvement would be shared in by this territory, and hence it was deemed proper that it should share in the burdens, if any. A district was erected so that a tax for the designated purpose might be levied and collected. The erection of the district was an incident, though a necessary one, to the main object. As the main object can be gathered from the title of the act, it must be held not to be invalidated by the constitutional provision cited. The provision requiring the object of the act to be stated in the title is found in nearly all modern constitutions, and is directed against the vicious practice of embodying numerous objects in an act, and thus passing objectionable measures without being discovered on reading by the title only. When such acts come under review in courts, the provision cited is properly applied with strictness. A provision that all bills shall be read at length before final passage, now found in most constitutions, has given additional safeguards against fraudulent legislation, and made it unnecessary, except in special cases, to construe the provision with strictness. Under these views we deem the title of the act sufficiently expressive of its object to avoid the constitutional objection raised.

There remains for consideration the question of authority; that is, had the county court of Jackson county power under

then existing laws to issue the bonds? It must be admitted that this question is not without its difficulties. While the decisions of United States courts are that the bondholder is not bound to look beyond the power to issue the bonds, it may not be unjust, or even exacting, to say to him, this much at least you shall do, and that courts will uphold this rule with the same strictness with which they have maintained the other.

The first section of the act of the eighteenth of March, 1871, after describing the newly erected district, states the object of the act to be to enable the town of Westport to subscribe stock to a horse or street railroad, and to levy a tax upon the real and personal property within the district for the payment of such subscription, and for no other purpose, said taxes not to exceed one-half of one per cent., and the subscription not to exceed $25,000. No direct power to issue bonds is here found.

The agreed statement of facts puts the assessed value of the district at $200,000, the taxes whereon, at half per cent., would be $1,000 a year, just sufficient to pay the interest on $25,000 at four per cent. Thus no effective aid could have been rendered in the way of forwarding the improvement contemplated, if the law is construed so as to exclude the issuing of bonds.

The second section of the act provides that "said district, in subscribing to a horse or street railroad company and in voting taxes to be levied for the same, shall be governed by the law regulating the subscription to railroad companies of municipal townships." This so-called township aid act of March 23, 1868, here referred to, contains provisions aside from the voting and levying of taxes; also for the issuing of bonds to pay such subscriptions. It seems that from abundant caution this township aid act was amended by the act of March 24, 1870, and its provisions made applicable to portions of municipal townships to vote and subscribe stock. Does the act of March 18, 1871, by its reference to the act of the twenty-third of March, 1868, so far make the latter act and

its amendment a part of the law so as to furnish authority to the county of Jackson to issue bonds to pay for subscriptions to the horse railroad? That it has been so construed by the parties interested there can be no doubt. The order of the county court directing the election to be held submits to the voters among other things the question of the issuing of bonds in payment of the subscription, and does so in exact conformity to the municipal township railroad aid act, which authorizes the issuing of bonds, if approved, by a two-thirds vote. In the furtherance of justice it must be held that the act of the eighteenth of March, 1871, so far made the act of March 23, 1868, a part as to authorize the issuing of the bonds. Here the county of Jackson, through its legally constituted authority, the county court, subscribed stock. It has sold and assigned this stock, and with the $12,000, proceeds of the sale, paid part of the bonds issued. The town of Westport and the district of which it constitutes a part have accomplished the object of constructing a horse railroad, and are enjoying its benefits. They have recognized the bonds and given them value by paying part of them and the interest on the whole for a number of years. To turn around now after all of this and say no power to issue the bonds existed, savors of injustice not to be tolerated or upheld by a court, unless bound to do so under the strict letter of the law. Any doubt as to the proper construction of the act must be solved in favor of good faith. If the question was on the issuing of an injunction or other proper remedy to prevent the issuing of the bonds for a want of power, any doubt as to a proper construction of the act would be solved against the exercise of the doubtful power.

Under the views entertained by the court the bonds are declared valid, and the judgment will be for plaintiff.

EELLS and others, Administrators, *v.* HOLDER and others.

(District of Kansas. November, 1880.)

1. FOREIGN ADMINISTRATOR — RIGHT TO SUE.— In the absence of a statutory provision, it is clear that an administrator cannot sue outside of the state in which he is commissioned.
2. SAME — SAME — STATUTE OF KANSAS.— Under section 2491, Compiled Laws of Kansas, an executor or administrator appointed in any other state may sue in Kansas in like manner and under like restrictions as a non-resident may sue.
3. NOTES SECURED BY MORTGAGE FOLLOW THE PERSON OF PAYEE AND OWNER.— The payee and owner of certain notes secured by mortgage resided in Ohio, the maker of the notes and mortgagee resided in Kansas, and the real estate covered by the mortgage was in Kansas: *Held*, that upon the death of the payee and owner of the notes in Ohio and the appointment of administrators there, the title to the notes vested in such administrators, who were authorized to sue for a foreclosure of the mortgage in the courts of Kansas, the mortgage being a mere security and an incident to the notes.
4. PERSONAL ESTATE OF A DECEASED PERSON, WHERE ADMINISTERED.— The personal estate of a deceased person is to be regarded for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile.

Pratt, Brumback & Ferry, for complainants.

G. C. Clemens, for respondent.

MCCRARY, *Circuit Judge.*— The complainants sue as administrators of the estate of Stillman Witte, who died intestate in the state of Ohio, in which state the complainants were appointed administrators.

The respondent demurs to the bill upon the ground that the complainants cannot sue in this state in virtue of a grant of administration in Ohio. In the absence of a statutory provision, it is clear that an administrator cannot sue outside of the state in which he is commissioned. *Dixon's Executors* v. *Ramsey's Executors*, 3 Cranch, 519; *Fenwick* v. *Sears*, 1 Cranch, 259; *Noonan* v. *Bradley*, 9 Wall. 394.

The statute of Kansas, however, provides as follows:

"An executor or administrator appointed in any other state or county may sue or be sued in any court in this state, in the capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued." Compiled Laws, 1879, p. 436, sec. 2491.

The suit is upon notes secured by mortgage upon real estate situated within this district. The mortgagee and payee of the notes was a citizen of Ohio, and died there, while the mortgagor is a citizen of this state.

Counsel for respondent concedes that the statute authorizes a foreign administrator to sue in this state in certain cases, but insists that, according to the allegations of the bill, the complainants had no right to bring this particular action, because they did not, by virtue of their appointment as administrators, become the owners of the notes and mortgage sued on; that the title did not pass to them so as to enable them to sue and recover. This presents the question whether the notes and mortgage, being the property of Stillman Witte, a citizen of Ohio at the time of his death, passed as assets into the hands of his administrators in that state, the mortgage being upon Kansas land, and the mortgagor and maker of the notes residing in the latter state? In other words, were the notes and mortgage assets of the estate of Witte in the state of Kansas or in the state of Ohio? The bill avers and the demurrer admits that at the time of the execution of the notes and mortgage the said Stillman Witte was a citizen of Ohio, and so continued until 1875, when he died intestate. It is now well settled that a mortgage given to secure a promissory note is a mere security and an incident to the note. Wherever the note is held and owned, there the mortgage follows. Can it be doubted that the notes sued on in this case were the property of Witte in Ohio at the time of his death, and that they became assets of his estate in that state? Property of this character — mere choses in action — has in law no locality separate from the parties by whom it is owned. In the case

of the *State Tax on Foreign Held Bonds*, 15 Wall. 300, it was held that bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the state in which the company was incorporated, they are property beyond the jurisdiction of that state. It was further held in that case that the fact that the bonds were secured by mortgage upon property situated in Pennsylvania did not make them property within that state, and this for the reason that a mortgage under the laws of Pennsylvania, as here, though in form a conveyance, is a mere security for a debt and transfers no estate in the mortgaged premises.

"It has long been settled," says the supreme court in *Wilkins* v. *Elliott, Administrator*, 9 Wall. 740, "and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and if he dies intestate, the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated." It follows that the notes and mortgage sued on in this case were assets of the estate of Witte in the state of Ohio, and as such passed to his administrators in that state, who had, according to the plain terms of the statute of Kansas, the right to sue upon them "in like manner and under like restrictions as a non-resident may sue." This statute clearly authorizes a foreign executor to sue in this state to recover any debt which is assets in his hands. I am not prepared to say that it does not authorize such an executor or administrator, in the absence of administration in this state, to sue in this state upon any debt upon which the deceased might have sued at the time of his death; but it is not necessary in this case to decide that point. It is enough for the present to hold that the debt sued for was assets in Ohio, and there passed to complainants.

Demurrer overruled.

UNITED STATES, *v.* COUNTY OF KNOX.

(Eastern District of Missouri. ———, 1880.)

1. MUNICIPAL BONDS—SPECIAL TAX—GENERAL FUNDS—GENERAL REVENUES.—A county court, authorized to levy for county purposes a tax of not more than one-half of one per cent. upon the assessed value of the taxable property of the county for each year, subscribed for stock of a railroad corporation and issued bonds in payment therefor pursuant to a law which authorized a levy of a special tax "not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year," to pay for the same. *Held*, that if the levy of one-twentieth of one per cent. was insufficient, the holders of such bonds were entitled to be paid the balance out of the general funds of the county, but not out of the general revenues. *United States* v. *County of Clark*, 96 U. S. 211.
2. MANDAMUS—OFFICE OF THE WRIT.—The command of the writ of *mandamus* cannot require an officer to do more than he is authorized by law to do.

Mandamus.

Plaintiff recovered judgment against said county on certain bonds issued by the county to the Missouri & Mississippi Railroad Company, in the year 1868, under the thirteenth section of an act of the general assembly of the state of Missouri, entitled "An act to incorporate the Missouri & Mississippi Railroad Company," approved February 20, 1865. The thirteenth section provides as follows: "It shall be lawful for the corporate authorities of any city or town, or county court of any county, desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent., upon the assessed value of the taxable property for each year."

On the first day of December, 1879, the relator filed its information for a *mandamus* against the county court of Knox county, to levy and cause to be collected a tax upon all the property in said county subject to taxation, and sufficient to pay off and discharge the warrant and judgment mentioned in the information, interest and costs, and to apply the same,

when collected, to the payment thereof, or show cause to the contrary.

Upon said information the court issued an alternative writ of *mandamus*, commanding said county court of Knox county to levy a sufficient sum to pay said judgment and costs, as prayed in the information, or show cause to the contrary. To said alternative writ the county court made the following return: That they had annually levied a tax of one-twentieth of one per cent. ever since the issuing of said bonds; that they had no authority to levy any other or greater tax than one-half of one per cent. to pay the current expenses of administering the county government, and said special tax of one-twentieth of one per cent.; that said one-half of one per cent. fund was all consumed in the administration of the county government, so that there was nothing left out of which to pay said judgment, or any part thereof, from the fund derived from said levy of one-half of one per cent., after paying said current expenses; that, by the constitution of the state, the maximum amount which said county was authorized to levy for county purposes was one-half of one per cent., and the statute which was in force at the time when said bonds were issued likewise imposed the same limitation upon the county court. They further set up that if they were to draw a warrant upon the fund derived from said levy of one-half of one per cent., and the same should be paid, there would be nothing left in the treasury with which to pay the current expenses of administering the county government, and the result would be that it might effect the disorganization of the county government — at all events that it would operate a suspension; and they denied the right of the relator to have a warrant drawn upon said fund, and also denied its right to have a special tax levied to pay its judgment.

To said return the relator interposed a demurrer.

Sleeper & Whiton, for relator.

James Carr, for respondent.

TREAT, *District Judge.*— The points presented arise on a demurrer to the return to the alternative writ of *mandamus*. The only point not heretofore settled by the decisions of the United States supreme court is whether, since the recent state statute concerning classification of funds, a *mandamus* can be awarded so that the warrant demanded may reach the general revenues derived from the levy of one-half of the one per cent., if the levy of one-twentieth of one per cent. is not sufficient, or whether such general warrant for the deficiency on the one-twentieth fund shall follow the language used by the United States supreme court in the case of the *United States* v. *The County of Clark*, 96 U. S. 211. Since that and other decisions rendered by the same court, the state statute passed for classification of the general revenues, it is contended, would practically leave no general funds applicable to the payment of plaintiff's judgment.

It may be that the purpose of the statute in question was to defeat the operation of the rules laid down in the decisions of the United States supreme court on this subject. But it must be borne in mind that under previous decisions of the same court the employment by United States courts of state or municipal agencies to enforce the judgments and decrees of United States courts must be in conformity with state statutes; or, in other words, that in the absence of authority on the part of county or municipal officers to act in the way desired, a United States court cannot compel them to so do. When United States courts seek the aid of county and municipal officers to enforce their judgments and decrees, they ought not to ask said officers, who are not United States officers, to go beyond their lawful duties in executing what United States courts demand. If they may be considered, *quoad hoc*, United States officers, still they are not clothed with other and greater authority than is vested in them by the laws creating their offices. The command of the writ issuing from a United States court cannot be for them to do what they have no legal right to do. That command can give them no legal authority

beyond what was before vested in them. The court cannot enlarge their powers. If they have the power they can be compelled to exercise it. If they have not the power the writ cannot confer it upon them.

The demurrer to the return in this case is well taken, and will be sustained, but the peremptory writ will issue for a warrant upon the general funds of the county, and, not as sought, upon the general revenues. The county must continue to levy annually the one-twentieth and the one-half of one per cent., such being the extent of its power, out of which the warrants issued must be paid.

The writ may issue in accordance with the views here expressed.

WANN *v.* KELLY.

(District of Minnesota. February, 1881.)

1. ILLEGAL CONTRACT — LIABILITY TO ACCOUNT FOR PROCEEDS.— A joint owner is liable to account to his associates for money paid under an illegal but completed contract.
2. SAME — ACTION AT LAW.— When, in a single adventure, which is closed, a person, jointly interested therein with others, appropriates the proceeds to his own use, he becomes a debtor to his associates, and an action at law gives adequate relief.

Gilman & Clough, for plaintiff.

W. P. Warner, for defendant.

NELSON, *District Judge.*— This action is brought by the plaintiff, Wann, against defendant, Kelly, to recover money paid to the latter for the plaintiff's use. The facts developed are these: The plaintiff and defendant and E. B. Gibbs agreed to engage in a speculation by the sale and purchase, or purchase and sale — it is immaterial which — of 300 shares

of Northern Pacific Railroad stock on their joint account, each to be interested to the extent of 100 shares. The transaction was determined upon and agreed to by the parties in the belief that the stock would depreciate in the market, and by "selling short" they would be able in the future to purchase so as to make a profit upon the whole transaction, called by stock-jobbers "the deal."

The plaintiff alleges it was agreed that Kelly should manage the speculation, and through his broker in New York sell 300 shares Northern Pacific Railroad stock, which was done November 8 and 11, 1879, and afterwards, when a depreciation in the price of the stock reached two points, or two dollars per share, he should order the broker to purchase 300 shares of the stock, and thus close the venture, and pay over to each his proportion of the profits.

The evidence shows very clearly that the arrangement contemplated, in fact, no contract of actual sale or purchase; but, on the contrary, the intention and design was that, as between themselves and the party with whom they dealt, all differences in the price of the stock, at the time of the supposed contracts, should be paid by one party to the other as performance and satisfaction thereof. There were no actual bargains for the sale of the actual stock, but mere bets or wagers on the future price — gambling transactions on the chance of future rise or fall. Kelly claims the deal closed November 19, 1879, when there was a depreciation of two or more points, showing a profit of $647, and that he has paid the plaintiff his portion, one-third of that amount. Wann admits the receipt of $215.66, but claims that the "deal" was not closed until November 22, 1879, when Kelly actually realized and received a profit of $2,000, and that he is entitled to one-third of this amount, which Kelly received for him. The broker in New York did not close up the speculation until November 22d, as appears by his statement rendered Kelly, for whom he acted, and the only person known to him in the business, at which time the profit realized was the sum before stated. Kelly fur-

ther claims that he was authorized by his arrangement, which was agreed to by Gibbs and plaintiff, to carry the "deal" on his own account, if he desired to, after a decline of two points, by paying each of them the profits resulting from such decline, and could close them out in that way. This is not the arrangement disclosed by the evidence. It was not possible to close up the transaction with Wann and Gibbs, unless by their consent, until he notified the New York broker to close the "deal," and that he would take the profit which resulted from the speculation at the time, whether the decline was two or more points. As the broker did not close the "deal" until November 22, 1879, if the plaintiff is entitled to recover anything, it will be upon the basis of the profit paid Kelly then. The testimony of Kelly shows that the three parties were interested to the extent of one-third each in the venture, and the statement rendered Wann purports to be based upon the close of the "deal" by the New York broker, November 19th. Kelly thought he could carry the speculation for his own benefit, and at his own risk, after a profit of two points was reached, but the arrangement, as testified to by all the parties to it, would not permit him to do so.

It is urged by Kelly that the business in which the parties engaged was contrary to public policy and illegal, and therefore he can retain all the profit which resulted therefrom without recognizing his associates jointly interested, and that a court will not enforce the plaintiff's claim. Such is not the law. The agreement between the parties related to a single transaction, and when the business closed, and Kelly received the profits, he was in duty bound to pay over to the plaintiff his part of it.

If the speculation was contrary to public policy and illegal, it had been closed, wound up, and the illegal object of it had been accomplished.

It is settled by the United States supreme court (*McBlair* v. *Gibbes*, 17 How. 237; *Brooks* v. *Martin*, 2 Wall. 70, and authorities cited) that when the illegal contract is completed,

and money has been received by a joint owner by force of the illegal contract, he will not be permitted to retain it, and cannot protect himself by setting up the illegality of the transaction in which it was paid him, but must account to his associates.

It is also urged by the defendant that plaintiff, if entitled to a share of the profit, can only enforce his claim in equity. I think an action at law gives adequate relief. The parties were engaged in a single venture, and the defendant, having appropriated the proceeds to his own use, made himself a debtor to the plaintiff. Judgment will be entered in favor of the plaintiff for $451, and interest from November 22, 1879. The amount being less than $500, costs must be paid by the plaintiff.

ARNOLD *v.* HYMER and others.

(Western District of Missouri. February, 1881.)

1. GRANTOR AND GRANTEE — PRIOR FRAUDULENT CONVEYANCE — PURCHASER AT SHERIFF'S SALE — SUBSEQUENT CONVEYANCE TO GRANTOR. Hymer fraudulently conveyed the land in controversy to his minor children, by deed of warranty, in September, 1861. The same land was subsequently attached by the creditors of Hymer, and sold at sheriff's sale to Rogers for the sum of $451. Hymer subsequently conveyed the same land to Arnold by deed of warranty, dated November 30, 1863, in consideration of $1,000. Afterwards, May 7, 1864, Hymer procured a deed from Rogers for the sum of $451, the purchase money having been advanced by Arnold. *Held*, there being presumptive evidence that part of the $1,000 received from Arnold had been invested for the benefit of the wife and children of Hymer, that the deed from Rogers to Hymer inured to the benefit of Arnold.

In equity.

Routt & Hardwick, for complainant.

Dunlap & Freeman, for defendants.

KREKEL, *District Judge.*—John B. Hymer, father of the defendants, in 1861, and while in debt beyond his ability to pay, conveyed by warranty deed the tract of land in controversy in this suit to his three minor children, the youngest two years old, and the eldest six years old, stating in the deed the consideration to be $150; but by the defendants admitted to have been on account of love and affection. The deed, soon after its execution, was put upon record by the grantor. At the time of the execution of the deed the grantor was in possession of the land, the children to whom he had conveyed being with him, and the possession was continued up to the time of the sale and conveyance by Hymer to complainant. In 1862 a number of the creditors of Hymer brought suit by attachment against him, and had the land in dispute seized, alleging as ground for attachment that the conveyance by him to his children was fraudulent, and made to hinder and delay his creditors. In due time judgment was obtained in the attachment suits, and the land in controversy sold, Rogers becoming the purchaser thereof, paying $451 therefor. The deed to Rogers is dated October 26, 1863, and was duly recorded. On the thirtieth day of November, 1863, John B. Hymer sold the land he had conveyed to his minor children to the complainant, for and in consideration of $1,000, gave a warranty deed therefor, and delivered possession to him, and the said Arnold has held the same ever since. John B. Hymer, after the making of the two deeds mentioned, on the seventh day of May, 1864, at the suggestion of Arnold and by his aid, obtained a deed from Rogers, the purchaser on sheriff's sale, the consideration being $451, the same Rogers had paid.

It is an undisputed fact than Arnold paid Rogers for the land. John B. Hymer, as stated, has made two warranty deeds to the land in controversy — the first, a deed of gift to his minor children, the present defendants, dated September 11, 1861; the second, to Merrett S. Arnold, the complainant, in consideration of $1,000, dated November 30, 1863. The

question, who has the better right to the land in controversy, under these conveyances, must depend upon the effect given to the deed from Rogers, in whom the title was vested by virtue of the sheriff's deed heretofore spoken of. It is claimed by the defendants that the after-acquired title, in John B. Hymer from Rogers, inures to their benefit by force of the warranty deed made to them; while the complainant insists that in equity it should be held to support his deed. Had the deed by Rogers, the consideration whereof was paid by complainant Arnold, been made to him instead of Hymer, no dispute could have arisen as to the title. Under the statutes of Missouri, conveyances made to defraud creditors are declared void. The decisions of the supreme court of Missouri, construing these statutes, are to the effect that a conveyance creates a resulting trust in favor of the grantor; that the property so conveyed may be sold under execution. To permit the title conveyed by Rogers to Hymer to support the deed made by Hymer to his minor children, for the purpose of defrauding his creditors, would be to uphold a conveyance which the law declares void. Equity favors a construction tending to carry out the evident intention of the parties, allowing the complainant the benefit of the purchase money paid by him, curing a possibly mistaken view which may have obtained concerning the effect of the conveyance from Rogers to Hymer. The deed from Rogers to Hymer is therefore held to support the one made by Hymer to complainant rather than the one to his minor children. The decree in favor of Arnold is based upon this view.

The attorney for defendants admits that there may be an equity in favor of complainant, to the extent of the amount of the purchase money paid by him to Rogers, because complainant made this payment before he had actual notice of the deed made by John B. Hymer to these defendants; assuming that it has been proven that the casual conversation between John B. Hymer and his wife was overheard by complainant, in which the wife insisted that the balance of the one thousand

dollars ($1,000) purchase money, after payment of debts, should be invested for her and the children, because the father had made the deed to them. At the time that this conversation occurred the legal title to the land was in Rogers, and was sometime after acquired by complainant paying Rogers the purchase money. It was satisfactorily shown that, without the payment of Rogers by complainant, John B. Hymer could never have obtained the title, because of his inability to raise the amount due Rogers; so that complainant may well have thought that his title came to him, which, in fact, it did, by virtue of the payment made to Rogers. It is also shown in evidence that investments were afterwards made by John B. Hymer in land, the deed for which was taken to the mother of these defendants, and by her death they have fallen heirs to that land, to the exclusion of the rest of the children of John B. Hymer; thus raising a strong presumption that his wife succeeded in accomplishing her desires, made known at the time of the making of the deed by her and her husband to Arnold, which the wife did not sign until the husband had promised he would invest the balance of the purchase money for her and her children's benefit. How inequitable it would be to thus obtain the benefit of part of the purchase money paid by complainant, and then turn around and take the land for which it had been paid. But this is not all. Here are heirs, whose ancestors warranted the title which they seek to defeat, thereby, if successful, causing a breach of warranty and creating a liability. A court administering equity often looks beyond the question which must determine the issues in hand, and though matter may not be sufficient to base a decree upon, yet they tend to remove doubts as to the conclusions arrived at. The decree will be that the title to the land in controversy vests in complainant; that the defendants be perpetually enjoined from prosecuting their suit in ejectment; and that complainant pay all costs.

PATRICK *v.* LEACH.

(District of Nebraska. June, 1881.)

1. ATTORNEY'S LIEN — STATUTE CONSTRUED. — Under a statute giving an attorney a lien upon "money in the hands of the adverse party in an action or proceeding in which the attorney was employed," it is doubtful whether an attorney can enforce a lien upon a judgment obtained by him for his client and against a third party. A judgment is not money in the defendant's hands belonging to the plaintiff.
2. SAME — NO LIEN ON JUDGMENT AT COMMON LAW. — At common law an attorney has no lien for his disbursements or fees upon a judgment obtained by him.
3. NOTICE — STATUTE CONSTRUED. — Under a statute giving an attorney's lien for a general balance for services, upon papers of his client which have come into his possession; upon money in his hands belonging to his client; and upon money in the hands of the adverse party in an action or proceeding in which the attorney is employed, "from the time of giving notice of the lien to that party," *held*, that the notice required to be given is personal notice and that it should be in writing.

This cause has been heard upon the petition of John C. Cowan and others, attorneys for David Leach, defendant, for leave to intervene for the purpose of claiming a lien for attorney's fees upon a judgment obtained by them in favor of said Leach and against complainant, which judgment the complainant seeks in this suit to have cancelled.

John C. Cowan and *John D. Howe*, for petitioners.

J. M. Woolworth, contra.

MCCRARY, *Circuit Judge.* — It seems to me doubtful whether the statute of Nebraska relied upon by the petitioners applies to the case in hand. That statute is as follows: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to

that party." The petitioners are attorneys at law, and claim a lien upon a certain judgment obtained by them in one of the courts of the state of Nebraska against the plaintiff herein.

It will be seen that the above quoted statute gives an attorney a lien upon, first, "any papers of his client which have come into his possession in the course of his professional employment;" second, "upon money in his hands belonging to his client;" and third, "upon money in the hands of an adverse party in an action or proceeding in which the attorney was employed."

Of course a judgment obtained by the attorney cannot be said to be a paper of his client which has come into his possession, nor money in his hands belonging to his client. Is it money "in the hands of the adverse party in an action or proceeding in which the attorney was employed?" I think not. It is a judgment; that is to say, the judicial determination upon the issues of law and fact, of a court of competent jurisdiction, that a sum of money is due from the defendant to the plaintiff. This is not money in the hands of the defendant. A judgment creditor may have the right to seize upon execution any money in the hands of his judgment debtor; but this does not make it the money of such creditor before seizure. If petitioners have no lien under the statute, they have no lien at all; for it is well settled that at common law an attorney has no lien for his disbursements or fees upon a judgment obtained by him. *Baker* v. *Crook*, 11 Mass. 235; *Hill* v. *Brinkley*, 10 Ind. 102.

In some of the states, as, for example, in Iowa, there are statutes giving the attorney a lien upon the money due his client from the adverse party in the litigation, but the statute of Nebraska above quoted contains no words which can be construed as giving such a lien.

If, however, I am wrong upon this proposition, I am very clearly of the opinion that no lien has been established in this case, for the reason that no sufficient notice was given under the provisions of the statute, assuming that it was applicable.

The notice provided for is undoubtedly personal notice, and I think very clearly it should be in writing. This would be so upon general principles, and I think also under the provisions of section 627 of the General Statutes of Nebraska, which provides that "the service of a notice shall be made as is required by law for the service of a summons."

For these reasons I am constrained to hold that the petitioners have no lien upon the judgment mentioned in the pleadings, and that their application to be made parties must be overruled.

WALLER *v.* NORTHERN ASSURANCE COMPANY.

(District of Iowa. May, 1881.)

1. INSURANCE — DUTY OF INSURED TO DISCLOSE HIS INTEREST — POLICY CONSTRUED.— Where an insurance policy provided that if the interest of the assured was less than the absolute title, "it must be so represented to the insurer and expressed in the written part of the policy," *held*, that it was the duty of the applicant for insurance, who held only a lien upon the property in the nature of a mortgage, to disclose the nature of his interest without being questioned, especially in a case where he appeared of record as the sole owner.
2. SAME — SAME — SAME.— It is the duty of the assured to state everything which might influence, and probably would influence, the company in accepting or declining the risk, and the nature and extent of the interest of the assured is material to the risk.
3. SAME — DUTY OF COMPANY TO INQUIRE — WAIVER.— Where the policy required a disclosure on the part of the insured, and did not require the insurer to make inquiry, or to request information, a waiver of this condition of the policy cannot be presumed from the mere fact that the assured was not requested to make disclosure, and no inquiry was made upon the subject.

On motion for new trial.

This is an action at law upon a policy of fire insurance, to recover damages for the destruction by fire of a certain building.

The policy sued on declares that John R. Waller has paid the premiun for insuring against loss or damage by fire the property hereinafter described in the several sums following, to wit: On his five story, shingle-roof, frame building, etc.

Said policy further provides as follows:

"If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, or if the building stands on leased ground, it must be so represented to these companies and so expressed in the written part of this policy; otherwise the policy will be void."

It appeared on the trial, and the fact was found by the jury, that the interest of the assured was that of a mortgagee only, though he held a deed unconditional on its face, and was in possession. When the assured applied for the insurance no inquiries were made by the company's agent, and no representations were made, as to the nature and extent of the plaintiff's interest in the property, and there was no statement in the policy concerning the same.

The property was found by the jury to be of the value of $8,000 or $9,000; and it is conceded that the interest of the assured therein was much less — being only about $5,000.

Plaintiff moves to set aside the general verdict in favor of defendant, upon the ground that it is inconsistent with the general findings, which are in substance stated above.

Shiras, Van Duzee & Henderson, for plaintiff.

Fouke & Lyon, for defendant.

McCrary, *Circuit Judge*.— The policy provides that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, * * * it must be so represented to the insurer and so expressed in the written part of the policy; otherwise the policy will be void."

The interest of the assured in the property insured in the present case was not the entire, unconditional and sole ownership, but on the contrary he held only a lien in the nature of a mortgage given to secure a loan of some $5,000. This fact was not represented by the assured to the defendant, and is not stated in the policy.

There is no proof tending to show that the defendant was aware of the fact. On the contrary, it clearly appears that the plaintiff's mortgage was, so far as the records disclosed the facts, a secret lien, being a conveyance absolute on its face; and since it was accompanied by actual possession in the mortgagee, there was nothing to rebut the presumption that he was the absolute and sole owner. These circumstances made it the duty of plaintiff to disclose the nature of his interest, even if it were conceded that a mortgagee out of possession, and whose interest is disclosed by the record, might be excused from so doing. There are strong reasons for upholding and enforcing the provision of the policy under consideration. It is certainly a very proper and reasonable provision in a contract of insurance of this character which requires the party seeking insurance upon property to state any facts which it is material for the insurer to know. That the nature and extent of the interest of the assured in the property is material, must appear very clear upon the least reflection.

In *Insurance Co.* v. *Lawrence*, 2 Peters, 25, Marshall, chief justice, in delivering the opinion of the supreme court of the United States, speaking of this very question, said:

"It may not be necessary that the person requiring insurance should state every incumbrance upon his property, which it might be required for him to state if it was offered for sale; but fair dealing requires that he should state everything which might influence, and probably would influence, the mind of the underwriter in forming or declining the contract.

"A building held under a lease for years about to expire might be generally spoken of as the building of the tenant, but no underwriter would be willing to insure it as if it was

his; and an offer for insurance, stating that it belonged to him, would be a gross imposition. Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against which would be suggested by his interest. The extent of his interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him."

These observations apply with great force to the present case. The plaintiff appeared to be the owner. The property was worth nearly double the amount of insurance asked for. Assuming, therefore, that he was the owner, he would have a large interest in guarding against the destruction of the property by fire; but when the fact was developed that he was not the owner, and held only an equitable lien upon the property as security for a sum but little greater than the amount of his insurance, it is seen that, in fact, his interest in the protection of the property was comparatively slight. It might well be that the defendant, if advised of the facts, would have declined to insure his equitable interest as mortgagee; or would have declined to insure it for a sum so nearly equal to its full value, or would have charged a much higher premium.

The provision in question is, therefore, one which must be upheld and enforced, not simply upon the ground that it is a warranty, and therefore to be enforced independently of its materiality, but also upon the ground that it calls for the disclosure of material facts. Upon this question see, in addition to the case above cited, the following: *Insurance Co.* v. *Lawrence*, 10 Peters, 507; Marshall on Fire Insurance, 789; *Jenkins* v. *Insurance Co.* 7 Gray, 370; May on Insurance, secs. 272, 287, 289, 291; *Rohrback* v. *Insurance Co.* 62 N. Y. 47.

But it is insisted that compliance with this provision of the policy was waived by the defendant company because its agent made no inquiry concerning the extent of plaintiff's interest, and plaintiff made no statement upon the subject.

This position is not tenable. The contract was, that if the interest of the assured was any other than the entire, unconditional and sole ownership, then he was to represent the facts to the company; not that he was to disclose them truthfully if requested; or that he would make true and full answers to questions upon the subject. The duty of disclosing the nature of his interest (the same being less than the entire ownership) was plainly devolved upon the plaintiff, and for good reason, since he knew, and the agent of the company did not know, the facts. In other words, under the contract, the defendant was authorized to assume that the property was owned absolutely by the applicant for insurance, unless the contrary was represented by him; and more especially in a case where the applicant held what appeared to be an absolute title. A waiver of this condition of the policy cannot, therefore, be presumed from the mere fact that the agent of the defendant made no inquiry upon this subject. The case might have been different if the plaintiff had been called upon to sign an application and to answer written or printed questions touching his interest, and had failed to do so. In such a case the issuing of the policy, notwithstanding the failure to answer some of the questions, might be held a waiver of such answers. *Hall* v. *Insurance Co.* 6 Gray, 186; *Liberty Hall Association* v. *Insurance Co.* 7 Gray, 261.

And it may also be true, that where the policy requires an application, and provides that it shall contain a true and full exposition of all the facts in regard to the condition, situation, value and risk of the property insured, a company insuring without such application may be held to waive the representations required to be embraced therein. *Commonwealth* v. *Insurance Co.* 112 Mass. 136. These authorities are not in point, for the reason that in the present case no written application was provided for in the policy, and, as already stated, the duty of divulging the fact that he was not the full owner of the property was devolved upon the plaintiff. Besides, it would be an unwarranted extension of the doctrine of estoppel to

hold that a party may waive that the existence of which he does not know, and is not in duty bound to ascertain.

The proof shows, and the fact is found by the jury, that the nature of the interest of plaintiff was not known to defendant prior to the fire. It was a secret interest, and there is nothing in the evidence tending to show that knowledge on the part of defendant of the nature of plaintiff's interest ought to be inferred. May on Insurance, sec. 506; *Finley* v. *Insurance Co.* 30 Pa. St. 311; *Allen* v. *Insurance Co.* 12 Vt. 366.

Motion for new trial overruled.

LOVE, *District Judge*, concurs.

VANZANDT, Trustee, *v.* THE ARGENTINE MINING COMPANY.

(District of Colorado. November, 1880.)

1. CONTEMPT — NATURE OF PROCEEDING.— Proceedings in contempt are in their nature criminal, and the strict rules of construction applicable to criminal proceedings are to govern therein.
2. INJUNCTION — DISREGARD OF BY PARTY OBTAINING ITS ALLOWANCE.— The writ of injunction only restrains action by the party against whom it is allowed and issued, and the plaintiff who obtains its allowance is not liable in contempt for doing the acts enjoined; but for a plaintiff to violate his own injunction, when the evident purpose of the writ is to preserve the existing status until a final adjudication, is a gross abuse of the process of the court, for which the injunction may be dissolved.

Bill in equity, filed by complainant, alleging his ownership of a certain silver mine in this state, and stating other facts upon which a preliminary injunction was granted, restraining the defendant from taking ore from said mine, or from disposing of any such ore pending the suit. Defendant was in possession prior to the allowance of said injunction and there was no order to disturb its possession. After the allowance and service of the writ the complainant took possession of the

mine, ejecting the defendant's agents therefrom. Upon application to the court, and proof of this latter fact, an order was issued requiring complainant to restore the possession to defendant and to abstain from any interference with the same pending further proceedings in the cause. Thereupon defendant moved the court that the complainant be ordered to show cause why he should not be punished for contempt in violating his own injunction.

Dixon & Reed, for motion.

Thomas & Campbell, contra.

McCrary, *Circuit Judge.*—1. A proceeding for contempt is in the nature of a criminal proceeding and to be governed by the strict rules of construction which prevail in criminal cases. Its purpose is not to afford a remedy to the party complaining and who may have been injured by the acts complained of; that remedy must be sought in another way. Its purpose is to vindicate the authority and dignity of the court. *Haight* v. *Lucia et al.* 36 Wis. 355.

2. We cannot hold that the complainant has subjected himself to this summary criminal proceeding by taking ore from the mine in dispute. Strictly speaking, the writ of injunction did not restrain the complainant from so doing; its only effect was to restrain the defendant and to subject its agents to punishment in case of a violation of the order. The injunction did not by its terms, or of its own force, forbid the complainant to interfere with the possession of the mine pending the suit, and therefore he cannot be held to answer in this proceeding. It does not follow, however, that a complainant, in such a case as the present, can with impunity do the acts which, at his instance, the defendant has been restrained from doing. Where, as in this case, the evident purpose of the writ is to preserve the existing status of property in litigation until a final adjudication can be had, it is a gross abuse of the process of the court for the complainant to disregard his own

injunction, after having by means thereof tied the hands of his adversary. And no doubt the court has ample power to prevent or redress such abuse. In this case the court did redress it by ordering the complainant to restore the property to defendant and to abstain from any further interference with the possession thereof pending the suit. If defendant had desired and asked a dissolution of the injunction, the court might have granted it on the ground that complainant was no longer entitled to the exercise of the discretionary power of the court for his protection. See remarks of LYON, J., on the point in *Haight* v. *Lucia*, *supra*.

Motion denied.

HALLETT, *District Judge*, concurs.

BROOKS & HARDY *v.* O'HARA BROS.

(District of Iowa. March, 1881.)

1. DECREE — WHEN SET ASIDE FOR FRAUD — WHAT A SUFFICIENT ALLEGATION OF FRAUD.— It is not enough to allege generally that the balance sued for was fraudulent and no such balance was due.
2. SAME — ALTERNATIVE ALLEGATIONS.— Nor is it sufficient to allege that the supposed balance for which decree was rendered, was made to appear either by a mistake of all the parties or by false statements of the amounts, and deception practiced, or by collusion. The allegation that said claim was either a mistake, or false and fraudulent, and based upon no consideration, etc.. not good.
3. SAME.— The facts constituting the fraud must be stated so that the court, and not the pleader, may determine whether, if true, they constitute fraud. It is also necessary to charge an intent to deceive, and all allegations must be direct and not in the alternative.
4. SAME — CHARGING UPON INFORMATION AND BELIEF — INJUNCTION.— An injunction will not be granted in the first instance upon a bill which charges fraud only upon information and belief.
5. FORMER DECREE — HOW ATTACKED — RES ADJUDICATA. — A former decree between the same parties and upon the same subject matter is final as to all questions which were or might have been investigated in that suit, unless it appears that by some wrong act of the successful party his adversary has been deprived of his right to fully present his case.

Bill in equity, brought to set aside a decree in favor of respondents, establishing a mechanic's lien upon the Burlington & Southwestern Railway, for $39,763.26, heretofore rendered in this court. The material allegations of the bill are the following:

"Your orators represent and show to the court that heretofore, to wit, about 1870, the Burlington & Southwestern Railway Company, a corporation in Iowa; constructing, owning and operating a railroad in Iowa and Missouri, by a certain deed of trust, duly and legally executed, conveyed its railroad property and franchises to your orators and one James F. Joy, who subsequently assigned his interest in said trust to your orators, said railway company being then and now a citizen of the state of Iowa, and your orators citizens of the state of Massachusetts, and said James F. Joy a citizen of the state of Michigan.

"That said deed of trust was made to secure certain bonds, to be issued by said railway company to aid in constructing said railway, to the amount of $20,000 per mile of road; which bonds were actually issued and sold; and said railway having made default in payment of interest on said bonds, your orators filed their bill to foreclose said mortgage in this court, and such proceedings were had that on the eighth day of June, 1871, a decree of foreclosure was entered, whereby it was found and decreed by the court that said company was indebted to your orators in the sum of —— million dollars, and said property ordered to be sold.

"Your orators further state and charge, that said respondents, prior to 1874, were engaged in constructing a certain portion of said road, having a contract to do the grading under J. W. Barnes, who was the original contractor, and which grading was to be done at certain prices set out and stipulated between him and said Burlington & Southwestern Railway Company.

"That said respondents, prior to January 1, 1874, made out and rendered to said railway company statements of the amount of work done by them and claimed to be paid therefor, and

certain estimates were made by the engineer of said railway company for the sums so claimed, under the belief and supposition that said statements made by them were true and correct.

"That prior to the first of January, as aforesaid, said railway company had paid to said respondents large sums of money on account of said work, and they held a large amount of said estimates, so called, for said work done, as claimed by them, which were not paid.

"That in December, 1873, said respondents brought suit in the circuit court of Appanoose county, Iowa, upon these estimates, claiming that there was yet the amount thereof due to them for grading done on said railroad, and such proceedings were had in the premises, that a judgment and decree was rendered in their favor against said railway company on the ninth day of January, 1874, for the sum of $39,763.24, besides costs; but your orators were not parties thereto; but your orators charge that said estimates were issued and said judgments obtained upon the belief that said respondents had done the work claimed by them, and that, in rendering their accounts, they had acted in good faith, and that their representations of the amount of work done was true and correct.

"That it was subsequent to the obtaining of this judgment that your orators commenced proceedings in this court to foreclose said mortgages, and in that proceeding said respondents were made parties to the bill, and appeared and filed their cross-bill, setting up said judgment and decree rendered in the circuit court of Appanoose county. Your orators beg to refer to said proceeding in said cause in this court as part of this bill, and without setting the same out *in haec verba*, to show what was done therein.

"That during the pendency of said suit, and before decree therein, the parties, by counsel, entered into an agreed statement of the facts, whereby it was admitted that said respondents' claim was correct, as shown by the judgment in Appanoose county, but such agreement was made under the belief and upon the representations that said judgment in Appanoose

county was properly obtained upon a true state of the facts, and without any knowledge that said claim was not correct, or that the work upon which it was based had not been done.

"Such other proceedings were had in said cause in this court, that on the eighth day of June, 1877, a decree was entered awarding to said respondents the amount of said judgment, in Appanoose county, Iowa, and ordering that the same be a lien on the property of said railway company, paramount and superior to that of the mortgage to your orators hereinbefore mentioned.

"That your orators and their counsel were wholly ignorant of what state of facts was proved in Appanoose county, or upon what representations or claim said decree was rendered, or whether the claim upon which it was based was correct or not, and your orators had no reason to know, and had no real knowledge of the uncorrectness of the same until within a few weeks last past. But so it is, and your orators now charge upon information and belief that the claim made by the respondents in said Appanoose county, and upon which said judgment and decree was rendered, was wholly fraudulent and fictitious; that the Burlington & Southwestern Railway Company, prior to the commencement of said suit in Appanoose county by respondents, had paid to them for grading and work done in the construction of its road, the sum of *two hundred and thirty-two thousand* ($232,000) dollars, and the amount sued for by them was for a claimed balance unpaid, which your orators charge was fraudulent, and that no such balance was due, and that the money paid by said railway company as aforesaid more than paid said respondents for all the work they had ever done upon said railway; that said supposed balance was made to appear either by mistake of all the parties, or by false statements of the amount, and deception practiced upon the Burlington & Southwestern Railway Company, or its engineer, or by collusion with the officers of that company, to defeat and injure the claims represented by your orators, and to defraud the holders of the bonds secured by

the mortgage to your orators. That said claim was either a mistake, or was false or fraudulent, and based upon no consideration, and upon a claim for work which was never done, and ought never to have been allowed, all of which was unknown to your orators, and with reasonable diligence could not be learned during the pendency of the suit in this court, the only one to which your orators were parties."

The prayer is for an injunction to restrain the execution of the decree, and that the same be set aside.

Respondents demur to the bill.

The demurrer is general, and the points raised under it are stated in the opinion.

P. Henry Smyth, for complainants.

Hubbard & Clark, for respondents.

McCrary, *Circuit Judge.— First.* The bill does not allege with sufficient particularity that the decree, which is sought to be set aside, was obtained by fraud.

It alleges in general terms that there was nothing due the respondents on their claim, and it is averred that "the amount sued for by them was for a claimed balance unpaid, which your orators charge was fraudulent, and that no such balance was due, and that the money paid by said railway company as aforesaid more than paid said respondents for all the work they had ever done for said railway."

It is further alleged that "said supposed balance was made to appear, either by a mistake of all the parties, or by false statements of the amounts, and deception practiced upon the Burlington & Southwestern Railway Company, or its engineer, or by collusion with the officers of that company, to defeat and injure the claims represented by your orators, and to defraud the holders of bonds secured by the mortgage of your orators.

"That said claim was either a mistake, or was false and fraudulent, and based upon no consideration, and upon a claim for work which was never done, and ought never to have been

allowed, all of which was unknown to your orators, and with reasonable diligence could not be learned during the pendency of the suit in this court, the only one to which your orators were parties."

A bill for relief on the ground of fraud must be specific.

It is not enough to charge in general terms that a particular transaction was fraudulent.

The facts constituting the fraud must be stated, so that the court, and not the pleader, may determine whether, if true, they constitute fraud.

This rule applies to all bills for relief on the ground of fraud, including, of course, a bill to set aside a judgment or decree upon that ground. Story's Eq. Pleading, 251, 428; Kerr on Fraud and Mistakes, 365.

It is also necessary to charge the intent to deceive, either by an express averment or by such words as necessarily imply such intent. *Moss* v. *Riddle*, 5 Cr. 351; *Gray* v. *Earl*, 13 Iowa, 188.

The counsel who drafted this bill evidently intended to comply with these rules by inserting the allegations embraced in the second quotation above, wherein it is set forth in effect that the balance due complainant was made to appear either by mistake of all the parties, or by deception practiced upon the railway company, or by collusion with that company.

By this allegation the complainants say, in substance, that the wrong was done them in one of these three ways, but as to which one they are unable to say.

The insufficiency of such an allegation will be very apparent when it is suggested that mistake is one thing and fraud another, and that the character of the case and nature of the defense would depend very much upon the question whether it is a case of mistake or a case of fraud that is set out.

No man can be required to answer and prepare for trial upon a bill which leaves him in doubt as to the exact nature of the case against which he is to defend.

Hence, the rule that allegations must not be in the alternative. Story's Eq. Plead. 245, 245a.

In view of these considerations, I am constrained to hold that the bill does not set forth the circumstances of the fraud charged with sufficient certainty and particularity.

Second. The fraud relied upon is charged only upon information and belief.

An injunction cannot be granted in the first instance upon an allegation of this character.

It is necessary that the fraud should be made to appear by positive averments, founded on complainant's own knowledge or that of some person cognizant of the facts. High on Inj. sec. 35, and cases cited; Id. sec. 110, and cases cited.

Third. Another and much more important question is presented by this record, and has been discussed by counsel.

This is a bill to set aside a former decree of this court between the same parties and upon the same subject matter.

It is clear that all questions touching the validity or amount of respondents' claim were open to investigation in the former suit.

Issue was joined upon their cross-bill, and testimony was taken and decree was rendered in their favor.

It was the right and duty of complainants to investigate the character of the claim, and to set up, in *that case*, whatever defense they had.

It is not enough to allege that they did not discover the facts in time so to do.

The only exception to this rule is in cases where, by some wrong act of the successful party, his adversary is deprived of the right to fully present his case. The rule is thus stated by Mr. Justice Miller in *United States* v. *Throckmorton*, 98 U. S. p. 65:

"But there is an admitted exception to this general rule in cases where, *by reason of something done by the successful party to a suit*, there was, in fact, no adversary trial or decision of the issue in the case.

"Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponents, as by keeping him away from court, a

false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently, or without authority, assumes to represent a party, and connived at his defeat; or where the attorney, regularly employed, corruptly sells out his client's interest to the other side. These and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained, to set aside and annul the former judgment or decree, and open the case for a new and fair hearing.

"See Wells' Res Adjudicata, sec. 499; *Pearce* v. *Olney*, 20 Conn. 544; *Wierick* v. *De Toya*, 7 Ill. 385; *Kent* v. *Ricards*, 3 Md. Ch. 392; *Smith* v. *Lowry*, 1 Johns. (N. Y.) Ch. 320; *De Louis et al.* v. *Meek et al.* 2 Iowa, 55."

The rule is clearly settled, at least so far as the federal courts are concerned, that a judgment will not be set aside upon an original bill, upon the ground that it was founded upon a fraudulent instrument or perjured evidence, when there were no hindrances besides the negligence of the defendant in presenting the defense in the first suit.

The case of *United States* v. *Throckmorton*, *supra*, is a striking illustration of this rule.

The judgment attacked in that case had been obtained, as was alleged, upon a grant which had been executed by a former Mexican governor of California, after he had ceased to hold that office, and falsely and fraudulently antedated.

The case was a strong one, but the court said: "There was ample time to make all necessary inquiries and produce the necessary proof, if it existed, of the fraud," in the progress of the original suit; and the bill was held bad on demurrer, because it was the duty of the complainants to ascertain the facts and make their defense in the original suit.

And the court quote with approval the following rule laid down by Shaw, C. J., in *Greene* v. *Greene*, 2 Gray (Mass.), 361: "The maxim that fraud vitiates every proceeding must

be taken, like all other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, *or so in issue that it might have been tried*, it is not again admissible. The party is estopped to set up such fraud, because the judgment is the highest evidence and cannot be contradicted."

See also the following authorities, cited by Mr. Justice Miller in same opinion: *Dixon* v. *Graham*, 16 Iowa, 310; *Cottle* v. *Cole*, 20 id. 482; *Borland* v. *Thorton*, 12 Cal. 440; *Biddle* v. *Baker*, 13 Iowa, 295; *Railroad Company* v. *Neal*, 1 Wood, 353.

The demurrer must be sustained, with leave to complainants to amend, if counsel thinks he can bring the case within the principles announced in this opinion.

So ordered.

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ABATEMENT. See *Practice*, 5.

ACCEPTANCE. See *Contract*, 5, 13.

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ACCOUNTING.

1. ACCOUNTING BETWEEN PRINCIPAL AND AGENT.—Where an agent in a settlement with his principal presents an account of debtor and creditor, upon the basis of which an adjustment and settlement is made, the principal acting upon the presumption that such account is correct, and relying upon the agent's representations in that regard, if there was either fraud, misrepresentation or mutual mistake in the account, a court of equity will set it aside and place the parties where they were before the settlement was made. *Milton Courtright* v. *James N. Burnes*, 532
2. COMPROMISE OF CONFLICTING AND DISPUTED CLAIMS.—But where after the relation of principal and agent had terminated the parties came together, and after full discussion made a general settlement and compromise, not merely of the items of an account stated, but of all matters in dispute, including doubtful and conflicting rights—in order to set aside such a settlement some positive fraud must be satisfactorily proved. *Id.*

ADMINISTRATOR.

1. ADMINISTRATOR—NOT LIABLE AS SUCH FOR CERTAIN CONTRACTS, NOR FOR TORT.—An administrator cannot bind the estate by any contract made upon a new and independent consideration, and much less for a tort. The action in such case is not against the administrator officially, but against him as an individual, and in his personal capacity. *Thompson* v. *Canterbury, Administrator*, 332
2. SAME—SAME.—*Held*, accordingly, that where an administrator undertook to sell and convey certain patented articles in violation of the patent right of the plaintiff, no action could be maintained against the administrator as such. *Id.*
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ADMINISTRATOR — continued.

4. SAME — SAME — STATUTE OF KANSAS. — Under section 2491, Compiled Laws of Kansas, an executor or administrator appointed in any other state may sue in Kansas in like manner and under like restrictions as a non-resident may sue. *Id.*

5. NOTES SECURED BY MORTGAGE FOLLOW THE PERSON OF PAYEE AND OWNER. — The payee and owner of certain notes secured by mortgage resided in Ohio, the maker of the notes and mortgagee resided in Kansas, and the real estate covered by the mortgage was in Kansas: *Held*, that upon the death of the payee and owner of the notes in Ohio and the appointment of administrators there, the title to the notes vested in such administrators, who were authorized to sue for a foreclosure of the mortgage in the courts of Kansas, the mortgage being a mere security and an incident to the notes. *Id.*

6. PERSONAL ESTATE OF A DECEASED PERSON, WHERE ADMINISTERED. — The personal estate of a deceased person is to be regarded for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile. *Id.*

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1. ADMIRALTY LAW — COLLISION — DAMAGES. — The expenses from the port of departure to the place of collision and of return to the port of repairs, will not be allowed in damages. *The Memphis & St. Louis Packet Company* v. *Steamboat H. C. Yeeger and others*, 165

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AGREEMENT. See *Receiver*, 4. *Insurance*, 7.

1. PURCHASE BY ONE PARTY TO AN AGREEMENT TO MAKE JOINT PURCHASE IS FOR JOINT BENEFIT OF ALL. — If two or more persons agree among themselves to purchase property for their joint account, and the purchase is accordingly made by one or more of them on behalf of all, the liability of each to pay his share of the purchase money, and his right to an interest in the property, cannot be controverted. So, also, if two or more persons enter into a contract with another to purchase property, all matters being fully arranged in the agreement, the equal right of all vendees to proceed in the execution of the contract may be conceded. But neither one of the vendees under such contract could take the title to himself, until default by the party excluded, in some manner to which he was bound by the terms of the agreement. *The First National Bank* v. *Bissell, Foss & Hunter*, 73

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2. PURCHASE AS TRUSTEE — WHEN HELD TO BE. — If one take unto himself a title which he has purchased with the money of another, he is a trustee for the true owner, who may rightfully follow the fund, wherever it may be miscarried. *Id.*

3. AN AGREEMENT TO NEGOTIATE FOR PURCHASE OF PROPERTY GIVES NO RIGHT TO EITHER PARTY THERETO. — An agreement between A. and B. to purchase the property of C. — the latter not being a party thereto — amounts simply to an agreement to negotiate with C. for the property, and presents no feature which can affect the title. Such an agreement could give no right to either party until consummated in the purchase of the property. *Id.*

4. AN AGENT TO PURCHASE A PARTICULAR PROPERTY FOR ANOTHER MAY REPUDIATE HIS AGENCY AND PURCHASE FOR HIMSELF. — The case is not different if A. and B. be regarded as agreeing to an agency in respect to the purchase of the property. For if one who is clearly an agent for another to purchase property, repudiate the agency and act for himself, using his own funds, he cannot be declared a trustee for his principal, although the latter may have been misled by the conduct of the former. *Id.*

5. TENANTS IN COMMON ARE BOUND TO PROTECT THE COMMON TITLE, BUT MAY DEAL WITH EACH OTHER THE SAME AS WITH STRANGERS, TOUCHING THEIR RESPECTIVE INTERESTS. — Although tenants in common are not at liberty to assail the common title by which all hold, they may deal with each other touching their respective interests, and are at liberty to purchase from each other, the same as a stranger might purchase from any or all of them. The purchase by one co-tenant of the interest of another will not inure to the benefit of all who retain an interest in the property. *Id.*

6. INDIVIDUAL ACTION OF MEMBER OF A PARTNERSHIP. — Fidelity to the partnership is the highest duty of its members, and no member can be allowed to turn the partnership concerns to his own account; and whenever a member is found to be seeking a private advantage from partnership dealings, the courts are prompt to correct such an abuse of confidence. To invoke this principle, however, it is necessary to show that the malversation was of partnership funds or effects, otherwise no member of the partnership can complain. *Id.*

7. THE RULE IN MINING PARTNERSHIPS. — In mining partnerships, the firm has no right of pre-emption as to the interests of retiring parties, especially when the parties are tenants in common of the mines, themselves, and not merely partners in the business of mining. In such an association it cannot be said that there is, in the collective body, a right to acquire new interests which its members are bound to respect. Each member holds his interest in his own right, with power to dispose of it as he thinks proper, and is free to deal with an associate or with a stranger in respect to such interest. And each member is

AGREEMENT — continued.
at liberty to buy from his associates and thus enlarge his interest in the whole property, without reference to the partnership relation — and such purchase will not inure to the benefit of other joint owners. *Id.*

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APEX OR TOP. See *Mining Location*, 1. *Vein*, 3. *Mining Claim*, 16.

APPEARANCE. See *Removal*, 4.

APPLICATION. See *Removal*, 8.

APPREHENSION. See *Reward*, 1.

ARKANSAS STATUTES. See *Attachment*, 3.

ARSON. See *Insurance*, 5.

ASSESSMENT WORK. See *Mining Claim*, 3.

ASSIGNEE. See *Bankruptcy*, 2, 3. *Equity*, 4, 5. *Note*, 2. *Removal*, 19. *Usury*, 2. *Tax Sale*, 2.

ASSIGNMENT. See *Bankruptcy*, 2, 3. *Injunction*, 9. *Removal*, 2. *Will*, 5.

ASSIGNOR. See *Removal*, 19.

ATTACHMENT. See *Removal*, 3.

1. ATTACHMENT — LEVY — PERSONAL PROPERTY.— To constitute and preserve an attachment of personal property capable of manual delivery, the officer must take the property into custody and continue in the actual possession of it, by himself, or by an agent appointed by him for that purpose. *Adler, Goldman & Company* v. *Roth, Defendant, and Shapleigh & Company, Intervenors*, 445

2. SAME — TWO WRITS — PRIORITY.— Where writs of attachment issue from a federal and a state court against the same defendant, the one under which the property is first actually taken into custody has priority, without regard to the date of the respective writs, and a United States marshal and a sheriff cannot make a joint or partnership levy, nor can one of these officers make a levy subject to the prior levy of the other. *Id.*

3. ATTACHMENT — REMOVAL OF PROPERTY OUT OF THE STATE — ARKANSAS STATUTES.— A statute in Arkansas declares a creditor may have an attachment against his debtor who "is about to remove or has removed his property or a material part thereof out of this state, not leaving enough therein to satisfy the plaintiff's claim or the claim of said defendant's creditors." *Held*, that a merchant who did not have

ATTACHMENT — continued.

property enough to pay his debts, and who invested a material portion of his assets in cotton and shipped it out of the state, was liable to attachment under this statute; that the plaintiff did not have to show the removal was made for a fraudulent purpose; and that the fact that the shipments of cotton out of the state were usual and customary with the defendant and with merchants generally, doing business in the state, constituted no defense to the attachment. *Mack & Co.* v. *McDaniel*, 198

4. ATTACHMENT — PROPERTY IN POSSESSION OF CARRIER — VENDOR AND VENDEE. — Certain property, to be paid for in cash on delivery, was attached by the vendee's creditors while still in the possession of the carrier. *Held*, that such creditors could acquire no right in the property, or to the possession thereof, as against the vendor, without, at least, payment of the price and charges. *Kelly and others* v. *Deming and others*, 453

ATTORNEY. See *Receiver*, 6.

ATTORNEY'S FEES. See *Injunction*, 2.

ATTORNEY'S LIEN.

1. ATTORNEY'S LIEN — STATUTE CONSTRUED. — Under a statute giving an attorney a lien upon "money in the hands of the adverse party in an action or proceeding in which the attorney was employed," it is doubtful whether an attorney can enforce a lien upon a judgment obtained by him for his client and against a third party. A judgment is not money in the defendant's hands belonging to the plaintiff. *Patrick* v. *Leach*, 635

2. SAME — NO LIEN ON JUDGMENT AT COMMON LAW. — At common law an attorney has no lien for his disbursements or fees upon a judgment obtained by him. *Id.*

3. NOTICE — STATUTE CONSTRUED. — Under a statute giving an attorney's lien for a general balance for services, upon papers of his client which have come into his possession; upon money in his hands belonging to his client; and upon money in the hands of the adverse party in an action or proceeding in which the attorney is employed, "from the time of giving notice of the lien to that party," *held*, that the notice required to be given is personal notice and that it should be in writing. *Id.*

AUDITOR. See *Receiver*, 5.

AVERMENTS. See *Pleading*, 2.

BAIL. See *County*, 2.

BANKRUPTCY. See *Judgment*, 1, 2.

1. BANKRUPTCY — DISCHARGE — ALIEN CREDITORS. — A discharge in bankruptcy under the United States bankrupt act is a bar to the claims of alien creditors suing in the courts of this country, in like manner as though they were citizens of the United States. *Ruiz* v. *Eickerman*, 259
2. ASSIGNMENT UNDER STATE LAW — BANKRUPT ACT. — An assignment for the benefit of creditors under state law is void as against an assignee in bankruptcy under act of congress, but is not void *ab initio*. It is subject to be avoided under proceedings taken under the bankrupt act. *Ostrander* v. *Meunch*, 267
3. SAME — SAME — DEMAND FOR ASSETS — INJUNCTION. — Where an assignee in bankruptcy was appointed after an assignee under state law had taken possession of the estate, he was entitled upon demand to all the assets in the hands of the latter. It was not necessary to apply for an injunction to restrain the assignee under the state law from disposing of them. *Id.*

BANKS.

1. NATIONAL BANK — RIGHT TO SUE IN FEDERAL COURTS. — A bank organized under the national banking law is not authorized to sue outside of the district in which it is located, in a circuit court of the United States, independently of any question of citizenship. *St. Louis National Bank* v. *Allen*, 92
2. SAME — JURISDICTION — CITIZENSHIP. — For the purposes of the jurisdiction of the federal courts, a national bank is to be regarded as a citizen of the state in which it is established or located. *Id.*

BILL OF LADING. See *Common Carriers*, 1, 2.

BILL OF REVIEW.

1. BILL OF REVIEW. — A bill of review upon newly discovered facts and evidence can only be filed within the period for taking an appeal and with the leave of the court. *The Pacific Railroad (of Missouri)* v. *The Missouri Pacific Railway Company, C. K. Garrison et al.*, 227
2. ORIGINAL BILL TO IMPEACH A DECREE FOR FRAUD. — Courts of equity have undoubted jurisdiction to entertain bills to set aside judgments at law or decrees in chancery on the ground of fraud. The rules by which the sufficiency of such bills is to be determined are the same, whether the purpose be to set aside a judgment at law or a decree in chancery. *Id.*
3. SAME — DILIGENCE. — No relief will be granted if the complainant had knowledge of the facts constituting the fraud, and in the exercise of due diligence might have made them known to the court pending the original suit. *Id.*

BILL OF REVIEW — continued.

4. SAME — SAME. — Nor will relief be granted if the complainant might by the use of due diligence have ascertained the facts and pleaded them in the original suit. *Id.*

5. SAME — ESSENTIAL ALLEGATION. — The bill must allege that the facts constituting the fraud were unknown to the complainant pending the original suit, and could not by reasonable diligence have been ascertained by him and brought to the notice of the court. *Id.*

6. CORPORATION — STOCKHOLDERS — DUTY OF LATTER TO TAKE CARE OF THEIR INTERESTS. — Where the stockholders in a corporation are dissatisfied with the action of the officers of the corporation in the conduct of a suit in equity, upon the ground that such officers are acting in bad faith and not protecting the interests of the stockholders, it is not enough for such stockholders to request the board of directors to remove such officers and appoint others in their places who will attend to the interests of the corporation. It is their duty, especially if such request is disregarded, to apply to the court for leave to intervene and protect their interests, and failing to do so, they are bound by the decree. *Id.*

7. STOCKHOLDERS — LACHES. — Where the stockholders in a railway corporation, having knowledge that their officers were not defending in good faith a foreclosure suit pending against the corporation, and having an opportunity to move in the original suit before decree or to file a bill immediately upon the rendition of the decree, failed to do either for a period of four years, during which the decree had been fully executed, the property sold and the sale confirmed, and the property conveyed by the purchaser to a new corporation which had issued new stock and executed negotiable bonds for large sums secured by mortgage on the property, and sold them in the market: *Held*, that such stockholders were guilty of laches. *Id.*

8. BILL OF REVIEW — FAILURE OF COMPLAINANT TO APPEAR IN ORIGINAL SUIT. — Where, upon the trial of a proceeding in equity for the infringement of a patent, the plaintiffs fail to appear, and the court examines the pleadings, exhibits and proofs, and orders a decree for the defendant, and afterwards the plaintiffs file a bill for review disclosing no error upon the record and setting up no new matter, a demurrer to such a bill for review will be sustained. *Irwin* v. *Meyrose*, 244

9. SAME — FAILURE TO TAKE TESTIMONY UNDER EQUITY BILL. — When a complainant in a bill in equity fails to take testimony within the three months' time prescribed by the 69th rule, and fails to obtain leave of court for further time to do so, the court will proceed to hear and determine the case as made upon the pleadings, proceedings and exhibits, and take such action with regard to the issues presented as the circumstances of the case may require. *Id.*

BOARD OF SUPERVISORS. See *Reward*, 1, 2.

BONDS. See *Equity*, 1. *Election Precinct*, 3, 4. *County*, 2. *Injunction*, 2, 3. *Constitutionality*, 1, 2, 3.

1. SEWING MACHINE AGENT'S BONDS — CONSTRUCTION OF CONTEMPORANEOUS WRITINGS.— Where there is nothing in the bond or contract of agency to show that the two instruments were to be taken as part of the same transaction, and both instruments can stand together and have full effect, parol proof cannot be introduced to limit the liability of the sureties in the bonds to transactions growing out of the agent's employment under the particular contract alone. *Singer Manufacturing Company* v. *Hester and others*, 417
2. RELEASE OF BOND BY AGENT.— The expression of opinion by an agent of the plaintiffs that the execution of a new agreement between the principal and agent, by which the character of the employment was changed, released the sureties, did not amount to a contract of release, in the absence of any authority to make such a contract. *Id.*
3. MUNICIPAL BONDS — SPECIAL TAX — GENERAL FUNDS — GENERAL REVENUES.— A county court, authorized to levy for county purposes a tax of not more than one-half of one per cent. upon the assessed value of the taxable property of the county for each year, subscribed for stock of a railroad corporation and issued bonds in payment therefor pursuant to a law which authorized a levy of a special tax "not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year," to pay for the same. *Held*, that if the levy of one-twentieth of one per cent. was insufficient, the holders of such bonds were entitled to be paid the balance out of the general funds of the county, but not out of the general revenues. *United States* v. *County of Clark*, 96 U. S. 211. *United States* v. *County of Knox*, 625
4. MANDAMUS — OFFICE OF THE WRIT.— The command of the writ of *mandamus* cannot require an officer to do more than he is authorized by law to do. *Id.*
5. COUNTY COURT-HOUSE BONDS — WHEN INVALID — STATUTE OF NEBRASKA.— Certain county court-house bonds, issued by a county in the state of Nebraska, *held invalid:* (1) because there was no statutory authority to vote for such bonds; (2) because no bonds had ever been voted by the county for any such purpose; (3) because none of such bonds, or the proceeds thereof, were ever used to build a court-house or were ever used for any other purpose by the county; (4) and because such bonds contained no recitals showing that the same had been issued conformably to law. *Lewis* v. *Board of County Commissioners of Sherman County*, 464
6. STATUTE — POWER TO "BORROW MONEY" — POWER TO ISSUE BONDS.— A law authorizing the electors of a county to empower the commissioners of a county to "*borrow money*" for the erection of a court-house, does not authorize them to empower such commissioners to *issue bonds* for that purpose. *Id.*

BONDS — continued.

7. SAME — SAME — SAME. — The authority to issue bonds as an evidence of indebtedness might perhaps follow as an incident of the right to borrow money, but in that case the amount of money borrowed should equal the amount for which the bonds call. *Id.*

8. COUNTY BRIDGE BONDS — WHEN VALID — NEBRASKA. — Certain county bridge bonds, issued by a county in the state of Nebraska, reciting that they were issued conformably to law, *held valid* in the hands of an innocent purchaser for value, in open market, when the bridges were built in the county, by direction of the county, for the county, and were paid for by such bonds or their proceeds, although such bonds were not in fact authorized by a vote of the people, as the law required. *Id.*

9. PRECINCT BONDS — LIABILITY OF PRECINCT — STATUTE OF NEBRASKA. — A statute of the state of Nebraska provided, *inter alia*, that "any precinct, in any organized county in this state, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act, and in such case the [county] commissioners shall issue special bonds for such precinct, and a tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds." *Held*, that a precinct issuing bonds under the terms of this statute was not thereby impliedly created a body corporate in order to insure the collection of the coupons attached to such bonds. *Jordan* v. *Cass County*, 3 Dillon, 185. *Blair* v. *West Point Precinct*, 459

10. SAME — NOTICE — REFERENCE TO STATUTE. — *Held, further*, that the mere fact that the bonds did not show upon their face that they were issued on behalf of the precinct was immaterial, when such fact appeared in the statute referred to upon the face of the bonds. *Id.*

11. SAME — LIABILITY OF COUNTY — STATUTE OF NEBRASKA. — *Held, further*, that such bonds, when issued by the proper officers of the county, were, in legal effect, bonds of the county, although voted by the inhabitants of the precinct, and to be paid by a tax to be levied upon the property within the precinct. *Id.*

12. SAME — COLLECTION OF COUPONS — MANDAMUS. — *Held, further*, in an action on the coupons attached to such bonds, that suit should be brought against the county, and that the judgment, when recovered, should be enforced by *mandamus* against the officers of the county, commanding them to levy and collect upon the property within the bounds of the precinct the sum required for the payment of the judgment. *Id.*

13. MUNICIPAL BONDS — "ISSUED" — STATUTE OF MISSOURI. — Municipal bonds are not duly "issued," under the laws of Missouri, unless the same have been duly registered in the office of the state auditor. *Douglass* v. *Lincoln County, in the State of Missouri*, 449

BONDS — continued.

14. CHARTER CONSTRUED — POWER TO ISSUE BONDS. — The charter of the St. Joseph Board of Public Schools gave the board power "to purchase, receive and hold property, real and personal, to lease, sell or dispose of the same, *and do all other acts as natural persons*," and also "generally to do all lawful acts which may be proper and convenient to carry into effect the objects of the corporation." *Held*, that these provisions, when considered in connection with the whole act, did not authorize the board to create a debt for building a school house and to issue bonds to pay the same. *Erwin* v. *St. Joseph Board of Public Schools; Osborne* v. *Same*, 608

15. SAME — POWER TO RAISE AND COLLECT TAXES. — Where the charter of a school board authorized it to make an annual estimate of the amount of money to be raised for the purpose of building, repairing and furnishing school houses, and required the county court to cause the same to be levied and collected upon all taxable property in the school district, *held*, that this provision was a limitation upon the power of the board regarding the building of school houses, and did not authorize the board to create a debt for that purpose and issue bonds for the payment thereof. *Id.*

16. MUNICIPAL BONDS — VALIDITY — CHARTER — SPECIAL ACT. — Where the charter of a railroad company authorized it to receive subscriptions to its stock from a county without a vote of the people, *held*, that a prior special act of the legislature, requiring a vote of the taxpayers as a condition precedent to such subscription, did not affect the validity of bonds in the hands of innocent purchasers. *Burr* v. *Charlton County*, 603

17. INNOCENT HOLDER OF MUNICIPAL BONDS. — The bonds having passed into the hands of innocent holders, it is enough if the power to issue them existed either under the charter or special act. The question whether the statute has been complied with, is for the authorities of the county to determine. *Id.*

BRIDGE.

1. BRIDGE — NAVIGABLE RIVER — NUISANCE — INJUNCTION. — A preliminary injunction to restrain the erection of a bridge across a navigable river will not be allowed where it is shown that such bridge will not be an obstruction necessarily amounting to a nuisance. *Northern Pacific Railroad Company* v. *Barnesville & Moorhead Railroad Company and others*, 224

BURDEN OF PROOF. See *Mining Claim*, 7, 9.

BURGLARY. See *Indictment*, 2, 3.

CASHIER. See *Receiver*, 5.

CERTIFICATE. See *Depositions*, 8. *Frauds*, 5, 6, 7. *Mining Claim*, 11.

CERTIFICATE OF LOCATION. See *Mining Claim*, 4.

CHANCERY. See *Injunction*, 3. *Bill of Review*, 2. *Removal*, 13.

CHARTER. See *Bonds*, 14.

CITIZENS. See *Homestead Entries*, 7.

CITIZENSHIP. See *Corporation*, 1. *Banks*, 1, 2. *Removal*, 5, 8, 15, 16.

CLAIMS. See *Removal*, 2. *Receiver*, 1. *Mining Claim*, 4, 5, 6, 7. *Mining Location*, 1. *Vein*, 1. *Negligence*, 16.

COLLATERAL SECURITY. See *Note*, 21.

COLLISION. See *Admiralty*, 1.

COLORED PERSONS. See *Homestead Entries*, 7.

COMMISSIONERS.

1. Act of Congress of March 3, 1877, in Relation to Hot Springs, Arkansas, Reservation — Decision of Commissioners.— The decision and judgment of the commissioners appointed under the provisions of the act of congress approved March 3, 1877, entitled "An act in relation to the Hot Springs reservation in Arkansas," upon questions of law and fact submitted to them in accordance with the terms of said act, held to be in the nature of a final adjudication and conclusive upon the parties. *Rector* v. *Gibbon et al.* 279
2. Same — Special Tribunal.— Where the law has confided to a special tribunal the authority to hear and determine certain matters, the decision of that tribunal within the scope of its authority is binding upon all parties. *Id.*
3. Lease — Improvements — Want of Title in Lessor.— Upon a proper construction of the said act of congress, the commissioners were right in holding that they were not bound to recognize any right to purchase in the complainant, who, without any title, legal or equitable, had assumed to execute leases upon the land, and to bind the lessees to pay him rent, and to sell him their improvements. Such leases are void. *Id.*
4. A Commissioner of a Court is Not a Separate Tribunal — His Functions as an Examining Magistrate Are Only Ministerial, Not Judicial.— A commissioner is but the officer of the court, to whom are committed duties which must otherwise be performed by the court itself. In all he does he is not a separate tribunal, but an arm of the court to execute preliminary work. As an examining magistrate his functions are ministerial, not judicial. *The United States* v. *Berry et al.* 58
5. Writ of Prohibition is never employed to control the conduct of a mere officer of the court; but the court may, whenever justice requires it, assume control of proceedings before its commissioner. *Id.*

COMMISSIONERS — continued.

6. QUESTION OF JURISDICTION — HOW RAISED ON PRELIMINARY EXAMINATION.— The defendants being before the commissioner of the United States court charged with crime, and the attorney general of the state having filed his suggestion denying the jurisdiction of the federal government, it is proper for the court to take charge of the investigation, and to this end will direct the commissioner to certify the proceedings. *Id.*

7. INDIAN TREATIES HAVE FORCE OF LAW — TREATIES WITH INDIANS have the force of law, and when entered into while the reservation is embraced in a territory are not repealed by implication by the passage of an act authorizing the formation of a state government. *Id.*

8. JURISDICTION TO PUNISH CRIME COMMITTED IN INDIAN RESERVATION.— Where a district of country has been, by competent authority, set apart as an Indian reservation, and by treaty stipulation the United States have assumed exclusive jurisdiction over it, such district remains an Indian reservation; the federal jurisdiction over it continues until it is changed by act of congress or by treaty, or until the Indian title is extinguished; and this notwithstanding it may be embraced within the limits of a state. This exclusive jurisdiction extends to and embraces the enforcement of the criminal laws. *Id.*

9. UTE RESERVATION — CONFLICT OF JURISDICTION — THE UTE RESERVATION, though within the state of Colorado, having been set aside as such by treaty, and the exclusive jurisdiction to punish crime therein being by the terms of the treaty vested in the United States, and this treaty not being, in terms, repealed by act of congress, the treaty remains in force as the law; and the United States district court has jurisdiction to try and punish offenders for crimes committed within the reservation. *Id.*

10. REPEAL BY IMPLICATION.— An express statute conferring special rights and privileges is held never to be repealed by implication unless the intent to effect such repeal is clear. *Id.*

COMMON CARRIER. See *Railroads*, 3, 4, 5. *Negligence*, 14, 16, 17, 20.

1. COMMON CARRIER — BILL OF LADING — LIMITING LIABILITY.— A contract entered into between a common carrier and a shipper, signed by both, and fixing the value of property shipped, and thus limiting the liability of a shipper in case of loss by his negligence, is valid, especially in a case where the property shipped is blooded horses, concerning the value of which, persons in general are not supposed to be competent judges. *Hart* v. *Pennsylvania Railroad Company*, 333

2. SAME — SAME — SAME.— Where certain horses were shipped by rail, and the bill of lading was signed by both carrier and shipper, and provided among other things that the carrier assumed a liability on the stock only to the extent of $200 for each of the horses, or $1,200 for the car-load, and through the carrier's negligence one of the horses

COMMON CARRIER — continued.

was killed and others injured, *held*, in a suit by the shipper for damages, that his recovery cannot exceed the amount fixed in the bill of lading, although he offered to prove that the horse killed was worth $15,000, and those injured were worth several thousand dollars each. *Id.*

COMMON LAW. See *Conditional Sales*, 1. *Mortgage*, 2.

COMPENSATION. See *Mariner*, 3. *Receiver*, 3, 4, 5, 6, 7.

CONDITIONAL SALES.

1. CONDITIONAL SALES — VALIDITY OF. — Conditional sales were valid at common law, and their validity was not affected by the English statute of frauds, nor are they within the recording acts of the state of Arkansas. *Blackwell, Thompson & Co.* v. *Walker Bros. & Co. and Deal* v. *Hicht*, 33
2. SAME — RIGHTS OF VENDOR AND VENDEE. — Such sales, oral or in writing, are valid in Arkansas, and creditors of, and purchasers from, the conditional vendee acquire no right to the property as against the vendor who has been guilty of no fraud and no laches in asserting his rights. *Id.*
3. SAME — STATUTE OF FRAUDS. — The statute of frauds of the state of Arkansas (sec. 2597, Gantt's Dig.) has no operation on such sales until the possession has continued in the vendee for five years. *Id.*

CONSENT. See *Mining Claim*, 12.

CONSIDERATION. See *Administrator*, 1, 2. *Homestead*, 12, 13.

CONSIGNEE. See *Negligence*, 17.

CONSIGNOR. See *Negligence*, 17.

CONSTITUTIONALITY.

1. CONSTITUTIONALITY OF STATUTE ATTACHING CERTAIN TERRITORY TO THE TOWN OF WESTPORT FOR CERTAIN PURPOSES. — The act of the general assembly of Missouri, entitled "An act attaching certain territory to the town of Westport, to enable said town to take stock in a railroad," approved March 18, 1871, is constitutional. It is not an act to authorize a municipal corporation to tax for its own local purposes lands lying beyond its own corporate limits. *Henderson* v. *Jackson County*, 615
2. SAME — TITLE OF ACT. — The act above named is not void by reason of a failure to comply with that provision of the constitution of Missouri which provides that every law enacted shall relate to one subject, and that shall be expressed in the title. *Id.*
3. POWER TO ISSUE BONDS UNDER ACT OF THE EIGHTEENTH OF MARCH, 1871. — The act of the general assembly of Missouri of the eighteenth of March, 1871, above cited, authorized the town of West-

CONSTITUTIONALITY — continued.

port to subscribe to the stock of a horse or street railroad, and to levy a tax upon the real and personal property within a certain district for the payment of such subscription. It further provided that "said district, in subscribing to a horse or street railroad company, and in voting taxes to be levied for the same, shall be governed by the law regulating the subscription to railroad companies of municipal townships." This latter act authorized the issuing of bonds. *Held*, that the whole act construed together, and embracing as it does the provisions of the township aid act referred to, authorized the issuing of bonds as well as the voting of a tax. *Id.*

CONTEMPORANEOUS ATTACHMENTS. See *Removal*, 3.

CONTEMPT. See *Mandamus*, 3.

1. CONTEMPT — NATURE OF PROCEEDING. — Proceedings in contempt are in their nature criminal, and the strict rules of construction applicable to criminal proceedings are to govern therein. *Vanzandt, Trustee*, v. *The Argentine Mining Company*, 642

2. INJUNCTION — DISREGARD OF BY PARTY OBTAINING ITS ALLOWANCE. — The writ of injunction only restrains action by the party against whom it is allowed and issued, and the plaintiff who obtains its allowance is not liable in contempt for doing the acts enjoined; but for a plaintiff to violate his own injunction, when the evident purpose of the writ is to preserve the existing status until a final adjudication, is a gross abuse of the process of the court, for which the injunction may be dissolved. *Id.*

CONSTRUCTION OF RAILROADS. See *Grants of Land*, 1.

CONTRACT. See *Negligence*, 16, 17, 19, 20. *Ultra Vires*, 1. *Bonds*, 1, 2. *Mariner*, 1, 2, 3. *Administrator*, 1, 2. *Receiver*, 1. *Agreement*, 1. *Insurance*, 7. *Homestead*, 12, 13.

1. CONTRACT — REVERTER OF PATENT-RIGHT. — A patent owned by A. and B. was assigned by them, as to certain states, to E., a corporation. The consideration of the assignment was the payment to the grantors of $8,500 cash, and the issuing of a prescribed number of shares of stock in E. to them. The cash was paid and the shares issued. The condition of the contract required the payment of a royalty to A. and B., and also exacted, under penalty of forfeiture, the use by E. of reasonable diligence, and its best endeavors to make the corporate scheme a success, the corporation having been organized to manufacture the patented article. On the other hand, A. and B. agreed to exercise reasonable diligence to promote the success of the enterprise, under the penalty of forfeiture of all rights of reversion. F. was a large stockholder in E., and, as such, furnished the required capital. The corporation was organized in 1872, failed in 1873, and F. purchased its assets, including the patent-right, but did not subsc-

CONTRACT — continued.

quently comply with the condition as to diligence, etc. Suit was brought by A. and B. to have the right acquired by F. declared forfeited. *Held*, that, as it appeared that the plaintiffs had received the full value of their patent-right, and were stockholders in E., which they had caused to be formed, and that as there was a failure on their part to comply with their promises as to making the business a success, no right of reverter or forfeiture existed. *Buckley and others* v. *Sawyer Manufacturing Company*, 350

2. CONTRACT — ENTIRETY.— No precise rule can be given by which the question whether a contract is entire or separable can be determined. Like most other questions of construction, it depends upon the intention of the parties to be gathered from what appears upon the face of the contract and surrounding circumstances. *Gray* v. *Hinton et al.* 167

3. SAME — SAME.— Where certain parties signed an agreement declaring that they would pay to a railroad company or its assigns $60,000, to be paid in installments, one portion when a railroad should be graded through two precincts named, and another portion when the road should be finished, the consideration for the promise being declared to be the construction of the road through said precincts: *Held*, that the parties signing the agreement were not liable on the contract for the first installment, without an allegation in the petition that the company have finished or offered to finish the road. *Id.*

4. CONTRACT — MUTUALITY.— The contract above described shows no mutuality. The railroad company was not bound by it. It amounted to a proposition by defendants, which could be made mutual and obligatory only by an acceptance on the part of the company. *Id.*

5. SAME — SAME — WHAT AMOUNTS TO AN ACCEPTANCE.— The performance of the contract by the railroad company would amount to an acceptance, and avoid the objection of want of mutuality; but part performance and a failure or refusal to complete the performance did not have that effect. *Id.*

6. CONSTRUCTION OF CONTRACT — USURY.— The law will not so construe a contract as to make it void if it will reasonably bear a different construction making it valid; and the defense of usury, especially where the penalty is the forfeiture of the whole debt, must be established by a clear preponderance of testimony. *Kellogg* v. *Miller*, 395

7. SAME — SAME — CONTRACT MADE WITH REFERENCE TO LAW OF A PARTICULAR STATE.— A contract fairly and honestly made between a citizen of Nebraska and a citizen of New York, whereby the latter agrees to loan to the former a sum of money at a rate of interest lawful in Nebraska, to be secured by mortgage on lands in Nebraska, is a valid contract, even if actually executed in New York, where the rate of interest named is unlawful. *Id.*

CONTRACT — continued.

8. SAME — SAME — PLACE OF PERFORMANCE. — The general rule is that the law of the place where the contract is made is to govern in expounding and enforcing it; but an exception to this rule arises where a citizen of one state loans money to a citizen of another state, and the parties in good faith contract for the rate of interest allowed by the law of the latter; and especially where the money is to be used in the latter and is secured by a mortgage upon lands located there. *Id.*

9. CONTRACT — CONVERSION. — The part owner of a contract for the purchase of a mine cannot use the same for the purpose of obtaining the title to the mine for a third party, without the consent of his associates. *Delmonica* v. *Roudebush and others*, 18

10. SAME — SAME. — In such case an associate is entitled to share, in proportion to his interest in the contract, in the property obtained by such part owner for his individual benefit through the use of such contract. *Id.*

11. SAME — SAME. — Such claim by the associate will not be defeated by the fact that the property obtained by such part owner was not wholly in return for the use of such contract. *Id.*

12. SAME — SAME. — A. and B. were part owners of a contract for the purchase of a claim to a mine. A. used such contract for the purpose of procuring such claim for C. without the consent of B., and also secured another outstanding title for the benefit of C. In return for these services C. gave A. an interest in the mine. *Held*, that B. was entitled to an interest in A.'s share of the mine proportionate to B.'s interest in the original contract. *Id.*

13. CONTRACT BY CORRESPONDENCE — ACCEPTANCE OF PROPOSITION. — Where it is alleged that a contract for exchange of property had been consummated by correspondence, and it appeared that the final letter of complainant, in which he claims to have accepted the proposition of respondent, contained a condition to which respondent never assented, *held*, that there was no consummated contract; that, though the condition might have been of small importance, yet the respondent had a right to an unconditional acceptance of his proposition before being bound. *Merriam* v. *Lapsley*, 606

14. ILLEGAL CONTRACT — LIABILITY TO ACCOUNT FOR PROCEEDS. — A joint owner is liable to account to his associates for money paid under an illegal but completed contract. *Wann* v. *Kelly*, 628

15. SAME — ACTION AT LAW. — When, in a single adventure, which is closed, a person, jointly interested therein with others, appropriates the proceeds to his own use, he becomes a debtor to his associates, and an action at law gives adequate relief. *Id.*

CONTRIBUTORY NEGLIGENCE. See *Negligence*, 15, etc. *Verdict*, 2, 3. *Pleadings*, 2.

CONTROVERSY. See *Removal*, 7.

CONVERSION. See *Contract*, 9.

1. FACTOR — PLEDGE OF GOODS — STATUTES OF MISSOURI. — Under the statutes of Missouri a factor is not authorized to pledge the consignor's goods for an amount beyond the sum of the advances and charges thereon. *Steiger and others* v. *Third National Bank*, 494
2. SAME — CONVERSION — TENDER. — In such case a tender of the advances and charges must first be made by the consignor before suit can be maintained for the conversion of the goods. *Id.*

CONVEYANCE. See *Mortgage*, 1, 2, 3. *Removal*, 14. *Grantor*, 1.

1. FRAUDULENT CONVEYANCE — PRESUMPTION OF FRAUD. — Fraud will be presumed where a voluntary conveyance to a wife is followed within a short time by the fraudulent disposition of the remaining estate of the grantor. *Burdick, Assignee*, v. *Gill and Wife*, 486
2. SAME — SUBSEQUENT CREDITORS. — Such conveyance will be void as to all subsequent as well as all prior creditors of the grantor. *Id.*
3. SAME — PROOF OF INJURY. — It does not *seem* to be necessary to show injury to the creditors, in addition to a fraudulent intent, in order to avoid a conveyance upon the ground of fraud. *Id.*
4. SAME — SAME. — If, however, a person, when about to contract debts, makes a voluntary conveyance, with the actual intent to deprive his future creditors of the means of enforcing collections of their debts, and this purpose is accomplished, such subsequent creditors are unquestionably thereby *injured*. *Id.*

CORPORATION. See *Bill of Review*, 6, 7. *Election Precinct*, 1. *Constitutionality*, 1.

1. CORPORATION — JURISDICTION — CITIZENSHIP. — A corporation is, for jurisdictional purposes, to be regarded as a citizen of the state under the laws of which it is organized. *Eaton* v. *St. Louis Shakspear Mining and Smelting Co. and others*, 362
2. FOREIGN CORPORATIONS — SERVICE OF PROCESS. — Where, by the local law, a foreign corporation is amenable to suits in the courts of the state, service being made upon an agent within the state, the federal courts may be regarded as courts of the state, and may take jurisdiction upon such service as would be good in a state court. *Id.*
3. SAME — JURISDICTION. — A federal court has no jurisdiction over a foreign corporation, in the absence of local law conferring jurisdiction on the state courts, though the corporation does business through an agent and has an office within the district where the court is held. *Id.*
4. SAME — CONSTRUCTION OF STATUTE. — Under the Revised Statutes of Missouri, which provide (section 3489) that "a summons shall be executed, except as otherwise provided by law: * * * *fourth*, where defendant is a corporation or joint-stock company, organized under the laws of any other state or country, and having an office or doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge

CORPORATION — continued.

of any office or place of business; or, if it have no office or place of business, then to any officer or agent or employee in any county where such service may be obtained:" *Held*, that as the St. Louis court of appeals has decided, in a case now before the supreme court of the state, that the above statute does not enlarge the jurisdiction of the state courts, nor authorize suits *in personam* therein against foreign corporations in cases not coming within the laws previously in force, but simply provides a substitute for constructive notice in a proceeding against such corporations, that the ruling of said court of appeals should be followed by United States courts, unless it is overruled by the supreme court of Missouri. *Id.*

5. JOINDER OF PARTIES. — A corporation is a necessary party defendant to a bill to enforce a judgment against it by compelling contribution from its stockholders. *Walsh and others* v. *Memphis, Carthage & Northwestern Railroad Company and others*, 156

6. SAME. — All the stockholders are also proper parties in such a suit, if they apply to be heard. *Id.*

7. JURISDICTION — WHEN SUIT IS NOT WHOLLY BETWEEN CITIZENS OF DIFFERENT STATES. — If A. and C. are citizens of the same state, and B., C. and D. are citizens of different states, a suit in which A. and B. are plaintiffs and C. and D. defendants, and in which they are all necessary parties, is not one over which a United States court will take jurisdiction, on the ground that the controversy is "between citizens of different states." To give a United States court jurisdiction on that ground, the controversy must be wholly between citizens of different states. *Id.*

COSTS. See *Injunction*, 2.

COUNTY. See *Reward*, 1. *Statute*, 2.

1. COUNTY — RIGHT OF TO SUE IN FEDERAL COURT OF ANOTHER STATE. — An organized county in the state of Iowa, having the right to sue and be sued, etc., under the laws of that state, may commence and maintain a suit in this court to recover property or its value, of which it has been wrongfully deprived. *Marion County* v. *McIntyre*, 143

2. MONEY DEPOSITED WITH AN INDIVIDUAL AS INDEMNITY — WHEN RECOVERED BACK. — Money deposited with an individual for a specific purpose, to wit: to indemnify him against loss or liability on an appearance bond in a criminal case, can be recovered back after the liability has ceased on such bond, and such a deposit can in no sense be regarded as a *payment* by the county. *Id.*

COUNTY BONDS. See *Bonds*, 5, 6, 7, 8, 11.

COUNTY CLERK. See *Mandamus*, 3.

COUNTY COMMISSIONERS. See *Election Precinct*, 4. *Mandamus*, 2.

COUNTY TREASURER. See *Mandamus*, 3.

COUNTY WARRANTS. See *Statute of Limitation*, 9.

1. COUNTY WARRANTS — WHEN VOID — STATUTE OF NEBRASKA.— County warrants, issued for the purpose of erecting a county court-house in the state of Nebraska, are void, where their issue was not authorized by a vote of the qualified electors of the county, and no benefit whatever resulted to the county from the issuing of the said warrants. *Brown* v. *Board of County Commissioners of Sherman County*, 469

COURT MARTIAL. See *Jurisdiction*, 1, 2, 3.

COURTS. See *Statute*, 1, 2. *Practice*, 6, 7, 8. *Attachment*, 2. *Banks*, 1, 2. *Removal*, 4, 5, 7, 8, 14. *Receiver*, 1, 4. *Jurisdiction*, 4, 5. *Removal*, 15, 16.

COVERTURE. See *Statute of Limitation*, 4.

CREDITORS. See *Bankruptcy*, 1. *Removal*, 3. *Conditional Sale*, 2. *Mortgage*, 2, 3. *Jurisdiction*, 4, 5. *Accounting*, 1, 2. *Conveyance*, 1, 2, 3, 4.

CREDITORS' BILL. See *Jurisdiction*, 4, 5.

CRIMINAL LAWS. See *Commissioners*, 8.

CRIMINALS. See *Reward*, 1.

CROSS-BILL. See *Equity*, 6.

CROSSINGS — RAILROAD. See *Verdict*, 2, 3.

CUSTOM.

1. CUSTOM — AGENCY — RIGHT TO CHOOSE EITHER OF SEVERAL CUSTOMARY METHODS.— Defendants were directed to place certain money to plaintiff's credit in the Exchange Bank of Denver, and in order to comply were obliged to transmit the money from Kansas City, Missouri, to Denver. *Held*, that defendants had the right to transmit the money by some usual and ordinary method recognized among business men as proper for that purpose; and where there were several methods of transmitting money between those points, equally in use among business men, and safe, serviceable and economical, they might choose either. *Earnest* v. *Stoller & Hill*, 380
2. SAME — USAGE AS TO TRANSMITTING MONEY.— A custom or usage as to transmitting money from one place to another, as from Kansas City, Missouri, to Denver, Colorado, cannot be so unless it extends to the place to which the money is to be sent as well as to that place from which it is sent. *Id.*

DAMAGES. See *Admiralty*, 1. *Insurance*, 2, 4, 6. *Common Carrier*, 2. *Pleadings*, 1, 2, 3. *Negligence*, 17, 18, 20. *Injunction*, 2, 3.

1. Erection of Dike in Mississippi River — Overflowing Lands — Injuring Ferry Franchise. — Suit to recover damages for injuries alleged to have been done to certain lands, and to a certain ferry franchise, by reason of the construction of a certain dike in the Mississippi river by the defendant. *Held*, (1) that plaintiff had, under the laws of Illinois, and according to the evidence, no title to the lands, for injury to which the suit was brought; (2) that the act of the general assembly of Illinois granting a charter for a ferry across the Mississippi river, under which the plaintiff claims, did not give the grantee any right to control the channel of the river, or to prevent its improvement, without compensation to him by the United States. *Mississippi River Bridge Co.* v. *Lonergan*, 91 Ill. 508, followed. *Lonergan* v. *Mississippi River Bridge Co.* 451

DEBTOR. See *Jurisdiction*, 5. *Accounting*, 1.

DEBTS. See *Receiver*, 1.

DECREE. See *Infringement*, 1, 2. *Bill of Review*, 7.

1. Decree — When Set Aside for Fraud — What a Sufficient Allegation of Fraud. — It is not enough to allege generally that the balance sued for was fraudulent and no such balance was due. *Brooks & Hardy* v. *O'Hara Bros.* 644
2. Same — Alternative Allegations. — Nor is it sufficient to allege that the supposed balance for which decree was rendered, was made to appear either by a mistake of all the parties or by false statements of the amounts, and deception practiced, or by collusion. The allegation that said claim was either a mistake, or false and fraudulent, and based upon no consideration, etc., not good. *Id.*
3. Same. — The facts constituting the fraud must be stated so that the court, and not the pleader, may determine whether, if true, they constitute fraud. It is also necessary to charge an intent to deceive, and all allegations must be direct and not in the alternative. *Id.*
4. Same — Charging upon Information and Belief — Injunction. — An injunction will not be granted in the first instance upon a bill which charges fraud only upon information and belief. *Id.*
5. Former Decree — How Attacked — Res Adjudicata. — A former decree between the same parties and upon the same subject matter is final as to all questions which were or might have been investigated in that suit, unless it appears that by some wrong act of the successful party his adversary has been deprived of his right to fully present his case. *Id.*

DEED. See *Statute*, 1. *Mining Claim*, 12. *Will*, 5.

1. Covenants of Seizin Run with the Land. — A covenant that land conveyed is "the property" of the grantor, and that it "has a

DEED — continued.
good right to sell and convey the same," runs with the land, and will inure to the benefit of a subsequent transferee. *Hall* v. *Scott County*, 356

2. AGENCY — POWER TO SELL. — The agents of a county, empowered to sell property, can sell only the title and interest of the county, however the proceeds of the sale are to be applied. *Henry* v. *Atkinson*, 50 Mo. 266. *Id.*

3. COVENANT — CONSTRUCTION OF. — A covenant of title should be taken in connection with the terms of the deed, and as only applicable to lands thereby conveyed. *Id.*

DEED OF TRUST.

1. TRUST — PARTNERSHIP. — Where a trust is created by deed, which contemplates the purchase of municipal bonds (the legal title to which is vested in the trustees) by a fund raised by the sale of certificates payable to bearer, which entitles the holder to participate in the income and in the distribution of the securities by a drawing, in a mode prescribed in the deed, the relation of partners does not exist between the certificate holders. Whether such a trust is illegal under the English Companies act, 1862, *quære*. *Johnson* v. *Lewis and others*, 479

2. NEGOTIABLE PAPER — TITLE OF PURCHASER. — The rule that the purchaser of a chattel acquires no better title than his vendor possessed has no application to negotiable paper. The party who takes such paper before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title good against all the world. *Id.*

DEFECT. See *Mining Claim*, 11, 12.

DEFENDANT. See *Removal*, 16.

DEFENSES. See *Statute*, 2, 3. *Attachment*, 3. *Vendor*, 2. *Note*, 2.

DELAY. See *Negligence*, 14, 16.

DEMURRER. See *Riparian Rights*, 3. *Bill of Review*, 8. *Removal*, 7. *Pleadings*, 1. *Negligence*, 19.

DEPOSITIONS.

1. DEPOSITION — CAPTION — NAMING PARTIES. — Where depositions are taken *de bene esse*, under the act of congress of May 9, 1872, in a case in which there are several parties plaintiff and defendant, it is not necessary to state in the caption the names of all the parties to the suit. It is sufficient to give the style in the case thus: *A. B. et al., plaintiffs*, v. *C. D. et al., defendants*. *Egbert and others* v. *Citizens' Insurance Company of Missouri*, 386

2. SAME — SAME. — A caption sufficiently shows the reason for taking depositions if it states where the depositions are taken, without giving

DEPOSITIONS — continued.

the distance from the place of taking to the place of trial, if the distance is in fact, and is well known by all parties to be, more than one hundred miles. *Id.*

3. SAME — CERTIFICATE. — Where an officer by whom depositions are taken seals them up, marks the style of the case on the envelope, directs them to the clerk of the court in which the case is pending, and writes the usual indorsement across the seal, and the depositions are received by the clerk to whom they are addressed, through the mail, *held*, that the certificate to the depositions should be deemed sufficient, though it fails to state that the officer delivered the depositions to the court in which the cause was pending, or that he sealed them up and deposited them in the postoffice. *Id.*

DESCRIPTION OF CLAIM. See *Mining Claim*, 5, 6.

DEVISEE. See *Will*, 1.

DILIGENCE. See *Bill of Review*, 3, 4, 5. *Receiver*, 5.

DIP. See *Mining Claim*, 16.

DISCOVERY OF MINERAL. See *Mining Claim*, 10, 11.

DISCOVERY STAKE. See *Mining Claim*, 2, 7, 13, 14, 16.

DISSOLUTION OF PARTNERSHIP. See *Partnership*, 2.

DOMAIN. See *Eminent Domain*. *Public Domain*.

DUTY. See *Negligence*, 14.

EJECTION. See *Removal*, 8.

EJECTMENT. See *Mining Claim*, 9.

ELECTION PRECINCT.

1. ELECTION PRECINCT, CANNOT BE SUED. — An election precinct has no corporate existence, and can neither sue nor be sued, under the laws of this state. *Osborn* v. *The County of Adams*, 97

2. MANDAMUS ONLY ISSUES AFTER JUDGMENT. — A *mandamus* cannot properly issue out of the federal courts until after a claim in dispute has been reduced to judgment. *Id.*

3. COUNTY MAY BE SUED TO ENFORCE VALID PRECINCT BONDS. — A suit can be maintained against a county to enforce the payment of a bond voted by and issued for a precinct to aid in works of internal improvement when such bonds are authorized by law. *Id.*

4. BONDS TO AID THE ERECTION OF STEAM GRIST MILL INVALID. — There is no law in Nebraska that authorizes the precincts to vote, or the county commissioners to issue bonds for and on behalf of a precinct, for the purpose of aiding in the erection and construction of a steam grist mill, and bonds issued therefor are simply void. *Id.*

EMPLOYEE. See *Pleading*, 21. *Negligence*, 16.

ENTIRETY. See *Contract*, 2, 3.

EQUITY. See *Bill of Review*, 1, 2, 3, 4, 5, 6, 7, 8, 9. *Receiver*, 4. *Riparian Rights*, 6.

1. EQUITY — INJUNCTION — BOND OF INDEMNITY. — Courts of equity will sometimes substitute a bond of indemnity for an injunction, if the ends of justice will thereby be promoted, and especially if any public interest may suffer by continuing the injunction in force pending the litigation. It is within the power of a court of chancery to accept such a bond when proceeding according to the general principles of equity. *The Northern Pacific R. Co.* v. *The St. Paul, Min. & Man. R. Co.*, 260
2. SAME — SAME — SAME — RULE IN FEDERAL COURTS. — The general principles of equity are administered by the federal courts of equity in all cases and in every state irrespective of local laws and state practice. *Id.*
3. SAME — APPLICATION OF RULE. — Held, therefore, in this case, where a prompt assessment of damages could not, in all probability, be had, and where the right of the complainant to any damages was matter of dispute, depending for its solution upon doubtful questions of law and fact, that a court of chancery, instead of stopping the progress of a great work of internal improvement, of general and public as well as of private importance, require a bond to be given and allow the construction to go on. *Id.*
4. MISTAKE OF FACT — EQUITABLE RELIEF. — The plaintiff, by reason of a mistake of fact, sent to a bank in New York to be credited to the Mastin Bank, more money than was due the latter. *Held*, that plaintiff was entitled to recover back the excess, and may in equity pursue and recover the proceeds wherever he can find them, unless they have passed into the hands of an innocent holder. *First National Bank of Omaha* v. *The Mastin Bank and Kersey Coates, Assignee*, 438
5. SAME — RIGHTS OF ASSIGNEE. — The Mastin Bank having made an assignment for the benefit of creditors, *held*, that plaintiff may recover against the assignee who took the assets subject to the equities existing against them in the hands of said Mastin Bank. *Id.*
6. AFFIRMATIVE RELIEF IN EQUITY — CROSS-BILL. — It is well settled that any affirmative relief sought by a defendant in an equity suit must be by cross-bill, and can never be granted upon the facts stated in the answer. *Chapin* v. *Walker et al.* 175
7. TITLE CANNOT BE INVESTIGATED IN A SUIT TO FORECLOSE A MORTGAGE. — According to the practice which prevails in the federal courts, in a suit to foreclose a mortgage, the mortgagee's title will not be investigated. Such title must be investigated in a court of law. *Id.*

ESTATE. See *Statute of Limitations*, 6.

ESTATE IN FEE. See *Will*, 1.

ESTOPPEL.

1. ESTOPPEL — JUDGMENT. — A party is bound by an adjudication where he has all the ordinary rights of a litigant with respect to such adjudication. *Miller and others* v. *The Liggett & Myers Tobacco Co.* 375
2. SAME — SAME. — A party who contributes money for the purpose of employing counsel, and carrying on a litigation, under a contract with a party to the record, has the right to take such action in the case as will protect his interests in such litigation. *Id.*
3. SAME — SAME — PRACTICE. — The validity of a patent having been in part sustained in one circuit, suit was brought in another circuit for infringement, by a party who had contributed to the payment of the counsel who had defended the first suit. *Held*, that the defendant was estopped by the adjudication in the other circuit, but that the court would not enter any decree based upon that opinion until the conclusion of the litigation in such other circuit. *Id.*
4. PRACTICE — PRIOR USE. — Evidence of prior use having been introduced in the latter suit, *held*, that the proper way to proceed would be by motion for a rehearing in the other circuit. *Id.*

EVIDENCE. See *Bonds*, 1, 2. *Writ of Error*, 2. *Insurance*, 1, 2, 3, 4, 5, 6.

EVIDENCE — NEWLY DISCOVERED. See *Bill of Review*, 1. *Contract*, 6. *Mining Claim*, 7, 9, 11, 15. *Jurisdiction*, 4, 5. *Mining Location*, 2. *Negligence*, 15, 18. *Will*, 5, 6.

EXAMINATION. See *Commissioners*, 6.

EXAMINING MAGISTRATE. See *Commissioners*, 4.

EXCEPTIONS. See *Writ of Error*, 2.

EX CONTRACTU. See *Fraud*, 7.

EXECUTION. See *Jurisdiction*, 5.

EXECUTOR. See *Will*.

EXEMPT. See *Removal*, 11.

EXEMPTION LAWS. See *Homestead Entries*, 1, 12, 13.

EXTINCTION OF INDIAN TITLE. See *Homestead Entries*, 11.

EXTRAORDINARY SERVICE. See *Receiver*, 5.

EXTRA PAY. See *Receiver*, 5.

FEDERAL COURT. See *Jurisdiction*, 4, 5. *Removal*, 15, 16. *Equity*, 2. *Courts. Banks*, 1. *Removal*, 4, 8, 12, 14.

FEDERAL DECISIONS. See *Fraud*, 3.

FELLOW SERVANTS. See *Negligence*, 1, 2, 3, 4, 5, 6, 7, 8.

FORECLOSURE. See *Equity*, 7. *Receiver*, 1. *Bill of Review*, 7. *Mechanic's Lien*, 3.

1. SHERIFF'S CERTIFICATE — REDEMPTION FROM MORTGAGE FORECLOSURE — WHEN NOT CONCLUSIVE — STATUTES OF MINNESOTA.— A sheriff's certificate of redemption from a mortgage foreclosure sale is not so far conclusive under the statutes of Minnesota as to prevent the redemptioner from showing that he paid the full amount of the redemption money within the time fixed by the statute for the making of a valid redemption. *Paige* v. *Smith*, 457

FORFEITURE. See *Receiver*, 6.

FRAUD. See *Practice*, 2. *Receiver*, 6. *Grantor*, 1. *Accounting*, 1, 2. *Conveyance*, 1. *Insurance*, 3, 4, 5. *Bill of Review*, 2, 3, 4, 5. *Tax Sale*, 3. *Decree*, 1, 2, 3, 4, 5. *Conditional Sales*, 2. *Attachment*, 3. *Injunction*, 9. *Homestead Entries*, 9. *Mortgage*, 1, 2, 3.

1. VENDOR'S FRAUD — PRIVITY — NOTICE — REMEDY.— It is a sound rule of equity, that where the vendee of personal property buys in good faith and without notice of fraud on the part of the vendor, and pays only a part of the consideration, agreeing to pay the remainder at a future day, if before final payment he receives notice of the vendor's fraud, he will be protected only to the amount actually paid before notice; but it is doubtful whether this rule can be applied and enforced in a court of law. *Sousteby* v. *Keeley et al.* 103
2. SALE OF PERSONAL PROPERTY — PROMISE BY VENDEE TO PAY VENDOR'S DEBT.— There is a conflict of authority in this country upon the question whether a promise made by the vendee of personal property, in consideration of the purchase, to pay a debt due from the vendor to a third party, is a contract upon which the latter may sue the former. Authorities cited. The affirmative has been held by the supreme court of Minnesota, and the negative by the supreme court of the United States. *Id.*
3. STATE AND FEDERAL DECISIONS — RULE OF DECISION IN FEDERAL COURTS.— Even upon questions of purely commercial law, the federal courts should follow those of the state, if it appears that by reason of the situation of the parties and of the subject-matter, to hold otherwise would subject a party to double payment of the same debt, without the possibility of relief from the federal courts. Such a case presents reasons for following the supreme court of the state, so cogent as to justify a circuit court in making it an exception to the rule requiring it to follow the rulings of the supreme court of the United States. *Id.*
4. FRAUD — HOW ALLEGED — INTENT.— An allegation that the defendant wrongfully, falsely and fraudulently certified and represented certain material facts to be true, whereas none of them were true, is

FRAUD — continued.

a sufficient allegation of fraud, as they clearly mean that such representations were made with fraudulent intent. *Bank of Montreal* v. *Thayer*, 1

5. RECEIVER'S CERTIFICATE OF INDEBTEDNESS PAYABLE TO BEARER — RIGHTS OF INNOCENT PURCHASER — FRAUDULENT REPRESENTATIONS.— Where a receiver of a railroad issued a certificate falsely and fraudulently stating that there was due the Joliet Iron and Steel Company, or bearer, $5,000 for indebtedness incurred by him, and falsely representing that the same was issued by order of court, and constituted a first lien on the railroad, etc., being for iron rails for constructing said road: *Held*, that such representations are to be considered as addressed to, and to be acted upon by any purchaser of the certificate in the market before maturity, and that it was not necessary to allege an intent to defraud the plaintiff, who was such a purchaser; nor was it necessary to allege or prove that there was a fraud practiced upon the Joliet Iron and Steel Company, the payee. In such a case the law presumes the intent to defraud whoever might purchase the certificates in the market, and upon the faith of the representations expressed upon their face. *Id.*

6. SAME.— Plaintiff must show that he acted upon said representations, and had a right to act upon them. *Id.*

7. SAME — WARRANTY.— When such an instrument is sued upon as a warranty, the action must be in the name of the person to whom such warranty is addressed, and cannot be maintained by a purchaser of the certificate who has no assignment of the cause of action upon the warranty. The action in such a case is *ex contractu*. *Id.*

FREIGHT. See *Negligence*, 14.

GARNISHEE. See *Garnishment*, 1.

GARNISHMENT.

1. GARNISHMENT — INTERROGATION OF GARNISHEE.— A garnishee may be required to answer questions tending to show that he was party to a fraudulent assignment by the defendant in the suit. *Oberteuffer and others* v. *Harwood, and Petit, Garnishee*, 415

GRANTEES. See *Mining Claim*, 11. *Grantor*, 1.

GRANTOR.

1. GRANTOR AND GRANTEE — PRIOR FRAUDULENT CONVEYANCE — PURCHASER AT SHERIFF'S SALE — SUBSEQUENT CONVEYANCE TO GRANTOR.— Hymer fraudulently conveyed the land in controversy to his minor children, by deed of warranty, in September, 1861. The same land was subsequently attached by the creditors of Hymer, and sold at sheriff's sale to Rogers for the sum of $451. Hymer subsequently conveyed the same land to Arnold by deed of warranty, dated

GRANTOR — continued.

November 30, 1863, in consideration of $1,000. Afterwards, May 7, 1864, Hymer procured a deed from Rogers for the sum of $451, the purchase money having been advanced by Arnold. *Held*, there being presumptive evidence that part of the $1,000 received from Arnold had been invested for the benefit of the wife and children of Hymer, that the deed from Rogers to Hymer inured to the benefit of Arnold. *Arnold* v. *Hymer and others*, 631

GRANTS OF LAND. See *Statute of Limitation*, 6.

1. GRANT OF LAND TO THE TERRITORY OF MINNESOTA TO AID IN THE CONSTRUCTION OF RAILROADS — INDEMNITY CLAUSE — ACT OF MARCH 3, 1857 — SELECTION OF INDEMNITY LANDS — ACT OF MARCH 3, 1865 — ACT OF JULY 13, 1866. *Barney and others* v. *Winona & St. Peter Railway Company*, 421

GUARANTY. See *Note*, 2.

HABEAS CORPUS. See *Jurisdiction*, 2.

HOMESTEAD ENTRIES. See *Land Grant*, 3, 4, 5.

1. HOMESTEAD AND EXEMPTION LAWS — TO WHAT LANDS THEY APPLY. — The fact that the title to land may be in the United States does not necessarily make it that part of the public domain which is subject to settlement by citizens of the United States under the homestead and pre-emption laws. *The United States* v. *Payne*, 289
2. TREATY — FORCE AND EFFECT OF AS A CONVEYANCE OF LANDS. — The treaty-making power has a right to convey title to the lands of the United States without an act of congress, and if a treaty acts directly on the subject of the grant, it is equivalent to an act of congress, and the grantee has a good title. *Id.*
3. TREATY-MAKING POWER MAY RESERVE PART OF PUBLIC DOMAIN. — The treaty-making power can reserve a part of the public domain for a specific lawful purpose, because this is but the exercise of a less higher power than that which conveys title. *Id.*
4. PRESIDENT'S PROCLAMATION RESERVING PART OF PUBLIC DOMAIN. — The president of the United States can by proclamation or executive order reserve a part of the public domain for a specific lawful purpose. *Id.*
5. POWER OF CONGRESS TO RESERVE, ETC. — Congress can by law reserve a part of the public domain for such purpose. *Id.*
6. RESERVATION — WHAT CONSTITUTES. — No set form of words or phrases need be used to set aside a reservation. It is enough if there are sufficient words to indicate the purpose of the power that acts, to show that it intended to act in a given case. *Id.*
7. COLORED PERSONS — THEIR RIGHTS IN INDIAN COUNTRY. — Colored persons who were never held as slaves in the Indian country, but

HOMESTEAD ENTRIES — continued.

who may have been slaves elsewhere, are like other citizens of the United States, and have no more rights in the Indian country than other citizens of the United States. *Id.*

8. TREATY — HOW CONSTRUED. — A treaty, like an ordinary contract or a statute, must be construed to give it effect, if possible, and courts always adhere to this rule. In construing a treaty we have a right to take into consideration the situation of the parties to it at the time it was made. The property which is the subject-matter of the treaty, and the intention and purposes of the parties in making the treaty. To get at the purposes and intention of the parties, we have a right to consider the construction the parties to the treaty, and who were to be affected by it, have given it, and what has been their action under it. *Id.*

9. SAME. — The construction of a treaty to be taken as the true one, is the one which has been adopted and acted upon by all the parties to it, unless the parties to it were mutually led into this construction by fraud or mistake. In a case where the mutual construction was in the face of the language used, and the rights of third parties had intervened, the language would be taken as governing. *Id.*

10. SEVERANCE OF A TRACT OF LAND FROM PUBLIC DOMAIN. — A tract of land lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and no subsequent law or proclamation will be construed to embrace it or operate upon it. Although no exception is made, congress cannot be supposed to include it by a law general in its terms. This doctrine applies with more force to Indian than to military reservations. *Id.*

11. INDIAN TITLE — EFFECT OF ITS EXTINCTION. — As soon as Indians part with their title the land ceases to be Indian country, without any further act of congress, *unless by the treaty by which the Indians parted with their title, or by some act of congress, or some executive order of the president, a different rule was made applicable.* *Id.*

12. HOMESTEAD EXEMPTION — CONTRACT — ACCORD AND SATISFACTION. — Under section 2695 of the Revised Statutes of Missouri, the homestead of a debtor who is the head of a family is exempt from sale for debts contracted before its acquisition by such debtor. Where a single note was given by the debtor before the acquisition of the homestead, and after such acquisition it was agreed between the parties that said note should be given up and cancelled, and five new notes for sums ranging from $100 to $150 should be given in its stead, in order to enable the creditor to sue in a justice's court, *held*, that such new notes created new indebtedness in place of the old, and were an accord and satisfaction of the latter. *In re Dixon, Bankrupt*, 556

13. SAME — SAME — CONSIDERATION. — An agreement by the debtor at the creditor's request and for his accommodation, to give new notes

HOMESTEAD ENTRIES — continued.
for small sums so as to enable the creditor to sue before a justice of the peace, is a sufficient consideration for an agreement to cancel a previous contract. *Id.*

HOT SPRINGS RESERVATION. See *Commissioners*, 1, 2, 3.

HUSBAND. See *Negligence*, 12.

IMPLICATION. See *Commissioners*, 10.

IMPROVEMENTS. See *Commissioners*, 3.

INDIAN COUNTRY. See *Reservation*. *Homestead Entries*, 7. *Commissioners*, 8, 9.

INDIAN TITLE. See *Homestead Entries*, 11.

INDIAN TREATIES. See *Commissioners*, 7.

INDEMNITY BOND. See *Equity*, 1. *County*, 2.

INDEMNITY OF LANDS — CLAUSE. See *Grants of Land*, 1.

INDICTMENT.
1. INDICTMENT FOR SEVERAL OFFENSES IN ONE INDICTMENT.— Sec. 1024 of the Revised Statutes of the United States permits separate offenses of the same class, and growing out of the same transactions, to be joined in one indictment in separate counts, provided they be such as may be properly joined. *Ex parte Peters*, 403
2. SAME — BURGLARY — LARCENY.— Burglary and larceny growing out of the same transaction are such distinct offenses as to be properly joined in the same indictment in separate counts and separately punished. *Id.*
3. SAME — SAME — SAME.— *Held*, accordingly, that a person who breaks and enters a house with intent to steal therefrom, and actually steals, may be punished under separate indictments, or under separate counts in the same indictment, for two offenses, or one, at the election of the power prosecuting him; and a person charged and convicted of both offenses growing out of the same transaction is not entitled to be released from imprisonment on *habeas corpus*, upon the ground that his sentence was illegal and void, either in whole or in part. *Id.*

INDORSEMENT. See *Negligence*, 17.

INFRINGEMENT. See *Bill of Review*, 8. *Estoppel*, 3. *Patent*, 1.
1. INFRINGEMENT — SUSPENSION OF INTERLOCUTORY DECREE — POWER OF COURT.— The suspension of an interlocutory decree, perpetually enjoining the infringement of a patent, until an accounting can be had and a decree entered from which an appeal can be taken, rests in the discretion of the court which granted the decree. *Brown* v. *Deere, Mansur & Co.* 425

INFRINGEMENT — continued.

2. SAME — SAME — SAME. — In the exercise of such discretion the court should look carefully to all the facts and circumstances involved, regarding the difference between royalties, licenses and patent monopolies. *Id.*

3. MOTION OVERRULED. — Motion to suspend the interlocutory decree for a perpetual injunction overruled under the circumstances of this case. *Id.*

4. INFRINGEMENT OF PATENT — FORFEITURE OF LICENSE. — Where the owner of a patent licenses any one to manufacture and sell the patented article, and the license is upon express condition that it shall become void upon failure on the part of the licensee to pay a specified royalty to the licensor, and it is agreed that after breach of condition by the licensee he may be treated as an infringer of the patent if he continues to manufacture or sell the patented article, *held*, that the licensee cannot be treated by the licensor as an infringer, and sued as such in a court of equity, for continuing to manufacture and sell the patented article after breach of condition, and notice to him from the licensor that he claims a forfeiture of the license. *Adams* v. *Meyrose*, 360

5. SAME — REMEDIES. — Under circumstances such as are above set forth, the owner of the patent may bring his action at law and establish his royalty and recover what is due, or file a bill in chancery and have the license annulled. *Hartell* v. *Tilghman*, 99 U. S. 547. *Id.*

INJUNCTION. See *Equity*, 1, 2, 3. *Bridge*, 1. *Practice*, 1, 2, 3. *Bankruptcy*, 2, 3. *Contempt*, 2. *Decree*, 4, 5.

1. INJUNCTION — ATTEMPT TO TAKE PERMANENT POSSESSION OF LAND FOR PUBLIC USE — IRREPARABLE INJURY. — An attempt to take permanent possession of land for public use, without the assent of the owner, express or implied, and without payment or tender of damages in advance, would, if consummated, be in the nature of an irreparable injury, to prevent which an injunction would ordinarily be granted. *Held*, in this case, that the equities of the bill were not fully denied by the answer, and a motion to dissolve the injunction could not therefore prevail. *Northern Pacific Railroad Company* v. *Burlington & Missouri Railroad Company and others*, 203

2. INJUNCTION — BOND — ASSESSMENT OF DAMAGES. — An injunction bond conditioned to "abide the decision" of the suit and "pay all sums of money, damages and costs that shall be adjudged" against the obligors if the injunction shall be dissolved, does not cover the amount of a judgment enjoined by the court nor the costs and attorney's fees therein. *Id.*

3. SAME — SAME — SUIT AT LAW. — The question whether a court of chancery on dissolving an injunction will itself proceed to assess damages resulting therefrom, or drive the defendant to a suit at law on the

INJUNCTION — continued.
injunction bond, discussed but not decided. *Browning et al.* v. *Porter et al.* 581
4. INJUNCTION — NUISANCE — NAVIGABLE RIVER. — A court of equity will not enjoin the erection of a runway for logs, upon the ground that it will divert the course of a navigable river, unless it appears that the threatened structure will be a nuisance *per se*. *City of St. Louis* v. *The Knapp, Stout & Co. Company,* 516
5. NUISANCE — RIVER. — A structure in the channel of a river will not necessarily be held subject to abatement as a nuisance. *Pennsylvania* v. *Wheeling Bridge Co.* 13 How. 518. *Id.*
6. INJUNCTION — NUISANCE — PARTY TO BILL. — It seems to be well settled that a bill in equity to enjoin or abate a public nuisance must be filed by one who has sustained, or is in danger of sustaining, special damages. *Id.*
7. INJUNCTION — INTERFERENCE WITH CONTROL OF PROPERTY IN POSSESSION OF STATE COURT. — No injunction will be granted by a United States court to interfere with the possession, control or disposition of property which is in the hands of a state court of co-ordinate jurisdiction. *Hutchison and others* v. *Green and others,* 471
8. RECEIVER — POSSESSION OF STATE COURT. — The possession of a receiver appointed by a state court, and acting under its orders, is the possession of the court itself, and the disposition of the property by the receiver is a matter to be ordered by the state court, and will not be interfered with by a United States court by injunction. *Id.*
9. SAME — FRAUDULENT ASSIGNMENT — INJUNCTION. — Where a state court has appointed a receiver of the property of a corporation, and a fraudulent assignment has been subsequently made of the same, a United States court will not enjoin the assignee from receiving such corporate property from the receiver, in case the state court having control thereof orders it to be turned over to him. *Id.*

INJURY. See *Injunction*, 1. *Pleadings*, 1, 2, 3. *Negligence*, 20.

INNOCENT PURCHASERS. See *Bonds*, 16, 17.

INSURANCE. See *Ultra Vires*, 1.
1. FIRE INSURANCE — ACTION ON POLICY — EVIDENCE. — In an action upon an insurance policy the plaintiff is bound, in the absence of any admission by the defendant, to establish, by a preponderance of the evidence, (1) the execution of the policy; (2) the total or partial destruction of the insured property; (3) the amount of the loss or value of the insured property destroyed; (4) and such notice and preliminary proof of loss as the policy requires. *Mack & Co.* v. *Lancashire Ins. Co. and others,* 211
2. SAME — "ACTUAL CASH VALUE." — In such case the term "actual cash value" means the sum of money the insured goods would have

INSURANCE — continued.

brought for cash, at the market price, at the time when, and place where they were destroyed. *Id.*

3. SAME — FRAUDULENT CLAIM. — In order to establish the fact of a fraudulent claim, it must appear (1) that there was a false statement in the preliminary proof as to the value of the goods destroyed, and (2) that such false statement was made with knowledge that it was false, and with the intent to defraud the defendant by deceiving him as to the value of the goods. *Id.*

4. SAME — SAME. — The mere fact that the loss is less than that stated in the preliminary proof would not be sufficient to establish fraud, though if the discrepancy between the true value and that stated by the insured is large, it would be some evidence bearing upon the issue of fraud. *Id.*

5. SAME — ARSON — EVIDENCE. — In a civil case the fact of arson need not be established beyond all reasonable doubt, but it must nevertheless be established by a clear preponderance of all the evidence adduced. *Id.*

6. SAME — VEXATIOUS DELAY — DAMAGES — EVIDENCE. — In order to recover damages for vexatious delay in the payment of a policy, it must be shown that there was no reasonable ground for contesting either the validity or the amount of the claim. *Id.*

7. INSURANCE — LOAN — USURY. — Where a contract for the loan of money and an agreement for insurance upon the life of the borrower are blended together in one and the same transaction, and the proof shows that the policy of insurance was taken and the premium paid in advance in consideration of the loan, the transaction is usurious if independently of the insurance transaction the maximum rate of interest is contracted for. *National Life Insurance Company* v. *Harvey*, 574

8. INSURANCE — DUTY OF INSURED TO DISCLOSE HIS INTEREST — POLICY CONSTRUED. — Where an insurance policy provided that if the interest of the assured was less than the absolute title, "it must be so represented to the insurer and expressed in the written part of the policy," *held*, that it was the duty of the applicant for insurance, who held only a lien upon the property in the nature of a mortgage, to disclose the nature of his interest without being questioned, especially in a case where he appeared of record as the sole owner. *Waller* v. *Northern Assurance Company*, 637

9. SAME — SAME — SAME. — It is the duty of the assured to state everything which might influence, and probably would influence, the company in accepting or declining the risk, and the nature and extent of the interest of the assured is material to the risk. *Id.*

10. SAME — DUTY OF COMPANY TO INQUIRE — WAIVER. — Where the policy required a disclosure on the part of the insured, and did not require the insurer to make inquiry, or to request information, a waiver

INSURANCE — continued.

of this condition of the policy cannot be presumed from the mere fact that the assured was not requested to make disclosure, and no inquiry was made upon the subject. *Id.*

INTENT. See *Fraud*, 4.

INTEREST. See *Insurance*, 7.

1. INTEREST — WHEN ALLOWED — FUND IN COURT. — Interest is allowed upon the ground that the debtor is in default and has the use of claimant's money. It is not, as a rule, allowed where payment has been prevented or suspended by the order of a court of competent jurisdiction to await settlement of controversy among several claimants. *Bowman* v. *Wilson, Assignee*, 394

INTERNAL IMPROVEMENT. See *Election Precinct*, 1.

INTERROGATORIES. See *Garnishment*, 1. *Intervenor*, 8.

INTERVENOR. See *Removal*, 8, 9.

INTIMIDATION. See *Mining Claim*, 3.

INVENTION.

1. INVENTION — ROTATORY SEED-WHEEL. — The substitution of an intermittent rotatory seed-wheel for an oscillatory seed-wheel, with the addition of the devices necessary to effect such rotatory motion, constitutes a valid and important improvement. *Brown* v. *Deere, Mansur & Co. and others*, 422
2. SAME — DIVISION INTO DISTINCT CLAIMS. — The supreme court having held divisional patents valid, there can be no legal objection to subdividing an invention into distinct claims. *Id.*

IRREPARABLE INJURY. See *Injunction*, 1.

JOINDER OF PARTIES PLAINTIFF. See *Mining Claim*, 12.

JOINT PURCHASER. See *Agreement*.

JUDGMENT. See *Estoppel*, 1, 2, 3. *Practice*, 2. *Election Precinct*, 2. *Jurisdiction*, 5. *Removal*, 16. *Bill of Review*, 2.

1. JUDGMENT — LIEN — BANKRUPTCY. — The plaintiff in a judgment in a state court which constitutes a lien on the land of the defendant is not deprived of his lien by a failure to prove his judgment in bankruptcy, in case the defendant is adjudged bankrupt after the rendition of the judgment. *Cottrell* v. *Pierson, Sheriff, and others*, 390
2. JUDGMENT IN FAVOR OF THE UNITED STATES — PRIORITY. — The priority given to the United States under certain sections of the Revised Statutes of the United States does not overrule any liens upon the debtor's property which existed before the event occurred which gives the statutory priority; that is, before the insolvency of the debtor. *Id.*

JUNIOR DISCOVERY. See *Mining Claim*, 16.

JURISDICTION. See *Removal*, 1, 13, 14. *Corporation*, 1, 3, 7. *Bill of Review*, 2. *Practice*, 4, 5, 6, 7, 8. *Banks*, 2. *Receiver*, 1. *Commissioners*, 6, 8, 9.

1. JURISDICTION — COURT MARTIAL. — The jurisdiction of a general court martial may always, upon the application of any party aggrieved by its judgment, be inquired into by the civil courts. Courts martial are special tribunals, with jurisdiction limited to a particular class of cases, and if such a court exceeds its authority, its judgment is void. and may be so declared by any court having jurisdiction of the proper parties and of the subject matter. *Barrett* v. *Hopkins*, 129
2. SAME — SAME — HABEAS CORPUS. — A circuit court of the United States has jurisdiction to issue the writ of *habeas corpus* to bring up the body of a person imprisoned by the judgment of a court martial, and who alleges that such court has transcended its powers, and to discharge the prisoner if that allegation is found to be true. *Id.*
3. SOLDIER — TRIAL AFTER EXPIRATION OF TERM OF ENLISTMENT. — Where jurisdiction of a court martial has attached, in a particular case, by the commencement of proceedings and the arrest of the accused, it will continue for all the purposes of the trial, judgment and execution. This rule applied to the case of a soldier in the army of the United States, who was arrested for a military offense before the expiration of his term of enlistment, and tried after such term had expired. *Id.*
4. JURISDICTION — CREDITORS' BILL. — A federal court may entertain jurisdiction of a creditors' bill, although the parties to the suit may be compelled to testify under an act of congress. *Frazer & Chalmers* v. *Colorado Dressing & Smelting Co. and others*, 11
5. SAME — SAME. — Such court may entertain jurisdiction of such bill although the code of the state gives special proceedings, having in view the same purpose, to reach any property of the judgment debtor, and subject it to execution under the judgment. *Id.*
6. CONFLICT OF JURISDICTION — REPLEVIN — SERVICE OF WRIT. — By the service of a writ of replevin, the court from which the writ issues obtains possession and control of the property replevied for all the purposes of jurisdiction in the replevin suit, and no other court of concurrent jurisdiction can subsequently interfere with such possession. The same property cannot be subject to two jurisdictions at the same time, and the first levy, whether made under state or federal authority, withdraws the property from the reach of the process of the other. *The Domestic and Foreign Missionary Society* v. *Hinman et al.* 543
7. SAME — PROPERTY CLAIMED AS A TRUST FOR CHARITABLE USES. — The rule above stated applies, notwithstanding one of the parties may claim the property for the purposes of a public charity only. The

JURISDICTION — continued.
question is, whether by taking jurisdiction this court will deprive another court of concurrent power of the right to proceed to judgment in an action commenced before the institution of these proceedings. *Id.*
8. FEDERAL JURISDICTION — INSOLVENT LIFE INSURANCE COMPANY — RECEIVER OF STATE COURT — POLICY-HOLDERS — STOCKHOLDERS — FRAUD. — Suit was instituted in a federal court by the policy-holders of an insolvent life insurance company against its stockholders for the fraudulent appropriation of a part of the assets of the company. *Held*, that such court could not assume jurisdiction when the company was in the hands of a receiver of a state court, who was proceeding to collect and administer the assets for the benefit of all the creditors. *Hamilton and others* v. *Choteau and others*, 509

JURORS.
1. JURORS — IMPROPRIETY OF. — An impropriety of jurors which did not prejudice the verdict is not ground for setting it aside and awarding a new trial. *Poole* v. *Chicago, etc. R. Co.* 251
2. SAME — MISCONDUCT — DISCUSSION OF PENDING CASE BY. — Discussion by a juror outside of the jury room, of a case pending and undecided before him, is the clearest evidence that he is not an unbiased and impartial juror, notwithstanding his disclaimer of the influence of such discussion upon his own mind. *Id.*
3. SAME — TEST OF MISCONDUCT FATAL TO VERDICT. — The test of what impropriety is to be considered as prejudicing the verdict is the answer to this question: Was the misbehavior of the juror such as to make it probable that his mind was influenced by it, so as to render him an unfair and prejudiced juror? *Id.*

JURY. See *Receiver*, 2. *Mining Location*, 1. *Negligence*, 15, 18. *Mining Claim*, 9, 11.

KANSAS STATUTE CONSTRUED. See *Mandamus*, 2, 3.

LACHES. See *Bill of Review*, 7. *Conditional Sales*, 2.

LAND GRANTS. See *Grants of Land*, 1. *Homestead Entries*, 2.
1. LAND GRANT — ACT OF CONGRESS OF JULY 2, 1864. — Under the act of congress of July 2, 1864, making a grant of lands to the Burlington & Missouri River Railroad Company in Nebraska (13 Stat. p. 364), the grant to the company attached to the land in controversy in this case on the fifteenth day of June, 1865, the date at which the line of the railroad was definitely fixed, although the land may have been actually selected by the company and patented to it at a later date. *Taboreck* v. *The B. & M. R. R. Co. in Nebraska*, 407
2. SAME — LATERAL LIMITS OF GRANT. — The fact that the grant to the defendant company has no lateral limits does not affect the question as to the date at which the rights of the company became vested. *Id.*

LAND GRANTS — continued.

3. ACT OF CONGRESS OF APRIL 21, 1876 — HOMESTEAD AND PRE-EMPTION RIGHTS. — The act of congress of April 21, 1876 (19 Stat. 35), which confirms all pre-emption and homestead entries in compliance with law, made in good faith by actual settlers, upon tracts of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office in the district in which such lands are situate: *Held* applicable only to cases where notice of withdrawal of the lands was required by law to be given. *Id.*

4. LAND GRANT ACTS CONSTRUED — LANDS "RESERVED OR OTHERWISE DISPOSED OF BY THE UNITED STATES." — By act of July 1, 1862, certain lands (not including those in controversy) were granted to complainant. By act of July 2, 1864, that grant was enlarged so as to include the land in controversy; but by an intervening act (that of March 3, 1863), they were granted to the state of Kansas for the use and benefit of respondent. *Held*, that by virtue of the act last named, and the withdrawal of the lands thereunder before the passage of the act of 1864, respondent acquired the title. *The Kansas Pacific Railway Company* v. *The Atchison, Topeka & Santa Fe Railroad Company*, 550

5. SAME — SAME — WITHDRAWAL BY THE SECRETARY OF THE INTERIOR. — The act of the secretary of the interior in withdrawing the lands from sale, pre-emption or homestead entry amounted to a reservation of the lands within the meaning of the act of 1864, which excepted from its operation all lands "sold, reserved or otherwise disposed of by the United States." *Id.*

LARCENY. See *Indictment*, 2, 3.

LEASE. See *Railroads*, 1, 2. *Commissioners*, 3.

LEDGE. See *Mining Location*, 1, 2. *Vein*, 1, 2, 3, 4, 5. *Mining Claim.*

LESSEE. See *Commissioners*, 3.

LESSOR. See *Commissioners*, 3.

LETTERS OF ADMINISTRATION. See *Statute of Limitation*, 1, 2, 3, 4.

LEVY. See *Attachment*, 1, 2.

LEX LOCI. See *Contract*, 8.

LIABILITY. See *Common Carrier*, 1, 2. *Reward*, 2. *Receiver*, 1. *Agreement*, 1. *Negligence*, 16. *Contract*, 14.

LIEN. See *Judgment*, 1, 2. *Receiver*, 1, 2. *Attorney's Lien*, 1, 2, 3.

LIMITATION. See *Statute of*, 1. *Title*, 1, 2, 3.

LIVE STOCK. See *Negligence*, 16, 17.

LOAN. See *Insurance*, 7.

LOCAL PREJUDICE ACT. See *Removal*, 17.

LOCATION. See *Mining Claim*, 4, 10, 11, 13. *Mining Location*, 1. *Vein*, 2, 4, 5.

LOCATION CERTIFICATE. See *Mining Claim*, 11.

LODE. See *Mining Claim*, 7, 8, 9, 10, 13, 14. *Mining Location*, 1, 2. *Vein*, 1, 2, 3, 4, 5.

LODE IN PLACE. See *Mining Location*, 1, 3.

MAGISTRATE. See *Commissioners*, 4.

MALVERSATION. See *Agreement*, 6.

MANDAMUS. See *Election Precinct*, 1. *Statute of Limitation*, 9. *Bonds*, 4, 11.

1. MANDAMUS — OFFICE OF WRIT. — The office of the writ of *mandamus*, when addressed to a public officer, is only to compel him to exercise such functions as the law confers upon him; and if it assumes to go further and order him to do that which by law he has no power to do, it is so far void. *The United States ex rel.* v. *Labette County*, 25

2. POWER OF COUNTY COMMISSIONERS — STATUTE CONSTRUED. — Sec. 6, ch. 107 of laws of Kansas, 1876, which authorizes the board of county commissioners to levy and collect taxes to pay certain bonds, and provides that "such tax shall be collected as other taxes are collected and paid out by the treasurer," etc., does not authorize the board to depart from the usual mode of collecting taxes provided by law, by which the board levies, the clerk prepares the tax roll, and the treasurer collects and pays over. *Id.*

3. SAME — BOARD CANNOT BE REQUIRED TO COLLECT AND PAY OVER TAXES. — Where a writ of *mandamus* was addressed to the "Board of supervisors of the county of Labette," that being the name in which the county as a corporation is to sue and be sued, and commanded said board to levy, collect and pay over certain taxes: *Held*, that the board was not liable to punishment for contempt because the county clerk and county treasurer of the county had failed to perform their duties in connection with the levy and collection of such taxes; but *held, also*, that the board may be required to proceed against the clerk and treasurer to compel them to perform such duties. *Id.*

MARINER.

1. MARINER — IMPLIED CONTRACT. — In the absence of shipping articles, there is an implied contract that the mariner will be returned to the port of shipment. *Worth and others* v. *Steam-Boat Lioness No. 2*, 208

MARINER — continued.

2. SAME — INTERNAL NAVIGATION — RETURN BY RAIL. — A mariner will not be justified in waiting until spring for a vessel to take him back to the port of shipment, where internal navigation has been closed by ice, and he has been discharged at a port whence he could return by rail. *Id.*

3. SAME — COMPENSATION. — In such case, where the mariner has not been employed for a specific period of time, he is entitled, by way of compensation, to the amount of his necessary transportation and expenses, together with his rate of wages from the date of his discharge to the date of his arrival at the port of shipment. *Id.*

MEASURE OF DAMAGES. See *Negligence*, 18.

MECHANIC'S LIEN.

1. MECHANIC'S LIEN — WAIVER BY TAKING COLLATERAL SECURITY — STATUTE CONSTRUED. — Section 2129 of the code of Iowa of 1873 provides that "no person is entitled to a mechanic's lien who takes collateral security on the same contract." Under this statute, as construed by the supreme court of Iowa, the holder of a claim for labor or materials for a building, erection or improvement upon land, does not waive his right to a mechanic's lien by taking security upon the same contract and upon the same property, unless it appear affirmatively that it was his intention to look to such security and not to his mechanic's lien. *Hale, Ayer & Company* v. *The B., C. R. & N. Railroad Company*, 558

2. SAME — SAME — SECURITY ON OTHER PROPERTY. — If, however, the security taken be upon other property besides that upon which the mechanic's lien rests, it is collateral security within the meaning of the statute, and the mechanic's lien is waived. Accordingly *held*, that a party who had furnished material to be used in the construction and repair of a railroad, and who took as collateral security certain bonds secured by mortgage upon one division of said railroad, including the rolling stock, had waived his mechanic's lien. *Id.*

3. FORECLOSURE — SALE ON EXECUTION — NOTICE TO PURCHASER. — Where, in a suit to foreclose a mortgage upon a railroad, a party who had furnished materials to be used in the construction and repair of the road intervened and filed a claim to be paid for said materials out of the earnings of the road, but stated in his intervening petition that "no mechanic's lien is claimed:" *Held*, that a purchaser at the foreclosure sale was not bound to take notice of any claim for mechanic's lien upon the road on account of said materials. *Id.*

MILITARY RESERVATIONS. See *Homestead Entries*, 10.

MILL RACE. See *Riparian Rights*, 6.

MINER. See *Mining Claim*, 8, 9, 10.

MINERAL IN PLACE. See *Mining Claim*, 1, 10.

MINING CLAIM. See *Removal*, 12. *Vein*, 1.

1. MINING CLAIM — POSSESSION BEFORE DISCOVERY OF MINERAL IN PLACE.— The prospector upon the public domain can hold to the extent of his claim in actual possession prior to the discovery of mineral in place; but if he stand by and permit another to sink a shaft within his boundaries, and the latter first discovers mineral, his will be the better claim. *Crossman et al.* v. *Pendery et al.* 139
2. MINING CLAIM — DISCOVERY STAKE — POSSESSION.— The statute of Colorado, which gives sixty days after the discovery of a mining claim in which to sink a discovery shaft and make location, does not require the discoverer to remain, during that interval, in actual personal possession by being present upon the ground. The erection of the discovery stake, with the required notice thereon, is notice to all others of the claim of the discoverer, and amounts to constructive possession, which is sufficient during the period provided by the statute. *Erhardt et al.* v. *Boaro et al.* 141
3. ASSESSMENT WORK — INTIMIDATION.— That the discoverer is prevented from doing assessment work within prescribed time, by intimidation on the part of an adverse claimant, is sufficient excuse, and will not deprive him of his right to locate the claim. *Id.*
4. MINING CLAIMS — CERTIFICATE OF LOCATION — RECORD.— Certificate of location must be filed of record in the office of the recorder of the county within three months next after the discovery (R. S. 629), in order to secure the claim from date of discovery against intervening claimants seeking to locate the same ground. But failure to so record the certificate will not render the same invalid — provided the requirements of the law be met before any other and better right to the same ground has been perfected. *Faxon* v. *Barnard et al.* 44
5. DESCRIPTION OF CLAIM — REFERENCE TO NATURAL OBJECT OR PERMANENT MONUMENT.— The act of congress (R. S. sec. 2324) requires that in the location certificate reference must be made to some natural object or permanent monument. This is in harmony with the statute of the state. (R. S. 630.) But whether so or not, congress has the right to require it, the purpose being to require that the claim shall be definitely prescribed. *Id.*
6. WITHOUT SUCH DESCRIPTION THE CERTIFICATE OF LOCATION IS VOID.— It is not a compliance with the law to describe a claim as "situated on the north side of Iowa gulch, about timber line, on the west side of Bald mountain. Said claim is staked and marked as the law requires." *Id.*
7. RIGHTS OF PARTY IN POSSESSION.— One in actual possession, having uncovered the lode, though not having filed upon the claim as required by law, cannot be ousted by a subsequent discoverer, as to the ground actually held. And the burden is upon the plaintiff to show that a

MINING CLAIM — continued.

defendant who had formerly been in possession was not still in possession at the time of his location. A location may be valid up to, but cannot be extended over a senior discovery in the actual possession of another. *Id.*

8. MINING CLAIMS — REQUISITES TO GIVE TITLES THERETO. — On the public domain a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of one thousand five hundred feet in length and four hundred feet in width, he must prove a lode extending throughout the claim. *Zollars and Highland Chief Consolidated Mining Co.* v. *Evans*, 39

9. EJECTMENT — WHAT NECESSARY TO MAINTAIN FOR MINING CLAIMS — BURDEN OF PROOF. — To maintain an action of ejectment for a mining claim, the plaintiff must establish not only that he is in possession, but that a lode had been discovered on the claim prior to the commencement of action, and that such lode so discovered extends from the discovery shaft to the ground for which he sues. These are facts to be determined by the jury from a preponderance of the evidence. As to them, the burden is on the plaintiff. *Id.*

10. DISCOVERY OF MINERAL, THOUGH MADE AFTER LOCATION, WILL AVAIL AGAINST STRANGERS. — Though the locators of a mining claim may not, at the time of the location and survey of the claim, have sunk their shaft to the discovery of mineral in place, yet, if they shall thereafter so sink the shaft and find the lode, they will hold as against all who had not theretofore acquired an interest in the lode — the discovery relating back to the location. *Id.*

11. MINING CLAIM — DEFECTIVE LOCATION CERTIFICATE MAY BE AMENDED — PAPER TITLE. — When there is conflicting evidence touching the facts necessary to make valid the original location of a mining claim, the paper title of grantees claiming under the original locator will go the jury. A location certificate which is fatally defective, in omitting reference to natural object or permanent monument, may go the jury in connection with an amended certificate correcting such defect. *Van Zandt, Trustee*, v. *The Argentine Mining Co.* 159

12. PRACTICE — AMENDMENT AT THE HEARING. — Plaintiff having declared for the entire property, it was developed on the trial that, in consequence of a defective deed, he had title to only two-thirds of the claim. *Held*, that plaintiff could not, on this declaration, recover for two-thirds, and that the person holding title to the other third of the claim might not, without his consent, be joined as party plaintiff, yet plaintiff might amend his complaint so as to demand but two-thirds. *Id.*

13. MINING CLAIM — PREREQUISITES TO LOCATION. — Under the statutes, federal and state, no location of a mining claim shall be made until

MINING CLAIM — continued.

the discovery of a vein or lode within the limits of the claim; and a discovery shaft must be sunk thereon to the depth of at least ten feet. The mineral or ore so discovered must be in position — in the form of a lode — and not in a broken and fragmentary condition, intermingled with slide and *debris* on the surface. Discovery of ore after location, in a different part of the claim, will not avail. *Id.*

14. THE BURDEN is on the plaintiff to establish the fact that ore was so found in his discovery shaft, and that the same lode is continuous to the ground in controversy. *Id.*

15. EVIDENCE, WHAT SHALL BE OF PRIOR LOCATION. — Proof of the date of plaintiff's location, the others not being shown, and the fact that plaintiff's location is excepted from defendant's patents, will raise a presumption that plaintiff's location was first made. *Id.*

16. THE TOP OR APEX, ON A JUNIOR DISCOVERY — SENIOR LOCATION ON THE "DIP" WILL HOLD. — Ordinarily the owner of a mining claim in which is found the top or apex of a lode may follow the vein within or without his side lines on its "dip" to any depth; yet, if the same vein has been previously discovered and located on the "dip," such discovery will prevail against a junior discovery, though located on the apex of the vein. *Id.*

MINING LOCATION. See *Location.*

1. MINING LOCATION — PATENT — WHAT THEY CARRY WITH THEM. — The law provides that upon a location properly made, the claimant shall have the vein upon which the location is made, and all other veins and lodes having their top or apex within the lines of the location; and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location. But such vein or lode must be *in place*. *Iron-Silver Mining Company* v. *Cheeseman et al.* 191

2. VEIN, LODE OR LEDGE — DEFINITION OF — EXISTENCE OF, A QUESTION OF FACT. — *Vein, lode and ledge* are the words used in the statute to designate a mineral deposit in rock, and are supposed to be nearly synonymous in meaning. For the purposes of this case, it is sufficient to say that a vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. The existence of such vein or lode is a question of fact to be found by the jury from the evidence before them. *Id.*

3. ORE BODY "IN PLACE" — WHEN. — If the ore body is continuous to the extent that it may maintain that character, it is in place, whether deposited in that form, or moved to its position bodily with its inclosing walls. Whether the vein is thick or thin is not material, so it is continuous. But if the territory is so broken up, jumbled and mixed, the several parts together, that there is nothing continuous, there is no lode *in place*. *Id.*

MINING PARTNERSHIP. See *Agreement*, 7.

MINING PATENT, 1.

MISCONDUCT. See *Receiver*, 6.

MISTAKE. See *Homestead Entries*, 9.

MORTGAGE. See *Statute*, 1. *Partnership*, 3, 4. *Equity*, 7. *Receiver*, 1. *Administrator*, 3, 4, 5, 6. *Mechanic's Lien*, 3.

1. MORTGAGE OF PERSONAL PROPERTY — DELIVERY. — At common law a secret conveyance of personal property, without delivery, was fraudulent and void as to all who should deal with the vendor upon the faith of his ownership. *Crooks, Assignee*, v. *Stuart et al.* 13
2. SAME — STATUTE OF IOWA. — The statute of Iowa provides that "no sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice," unless the instrument is executed and recorded as conveyances of real estate are required to be executed and recorded. The ruling of the supreme court of Iowa, that a mortgage of personal property, when recorded, is good as against a creditor of the mortgagor who becomes such after the execution and before the recording of the instrument, being a decision upon a question of the construction of a state statute, is a rule of decision for this court; but if it were an open question, this statute would be construed as merely declaratory of the common law rule above stated. *Id.*
3. SAME — DEALING WITH THE MORTGAGED PROPERTY BY MORTGAGOR AS IF IT WERE HIS OWN. — Independently of the statute the law is, that where the mortgagor of a stock of goods remains in possession, and continues to sell, dispose of and deal with the property as if it were his own, the mortgage not being recorded, the same is void as against a creditor of the mortgagor who becomes such without notice of the mortgage. This being a question of general law, this court is bound by the decisions of the supreme court of the United States upon the subject. *Id.*

MORTGAGEE. See *Mortgage*, 2, 3.

MORTGAGOR. See *Mortgage*, 2, 3.

MOTION. See *Infringement*, 3. *Estoppel*, 4.

MOTION TO DISMISS. See *Practice*, 4.

MUNICIPAL BONDS. See *Bonds*, 3, 13, 16, 17.

MUNICIPAL CORPORATIONS. See *Election Precinct*, 4. *County*, 1, 2. *Mandamus*, 3. *Constitutionality*, 1, 2, 3.

MUTUALITY. See *Contract*, 4, 5.

NATIONAL BANKS. See *Banks*, 1.

NAVIGABLE RIVER. See *Bridge*, 1.

NAVIGATION. See *Mariner*, 2.

NEGLIGENCE. See *Verdict*, 2, 3. *Common Carrier*, 1, 2. *Pleadings*, 2.

1. NEGLIGENCE — FELLOW SERVANTS. — If a corporation employs several agents as fellow servants in the same common employment, and one of those servants is injured by the negligence of another, the corporation (at common law) is not liable unless it be that the servant who is guilty of the negligence was employed by the company with knowledge that he was incompetent or negligent, or was continued in service by the company after notice of the fact that he was incompetent or negligent. *Ross* v. *The Chicago, Milwaukee & St. Paul Railway Company*, 235

2. SAME — COMMON SERVICE. — If the company sees fit to place one of its employees under the control and direction of another, then the two are not fellow servants engaged in the same common employment within the meaning of the rule above stated. *Id.*

3. SAME — SAME. — Where the rules of the company required that "conductors must in all cases, while running by telegraph or special orders, show the same to the engineer of their train before leaving stations where orders are received," and that "the engineer must read and understand the order before leaving the station," *held*, that the engineer was in an important sense subordinate to the conductor, and they were not fellow servants. *Id.*

4. SAME — SAME. — Under such a rule the conductor was the superior of the engineer in respect to the duty of delivering or showing the running orders to the engineer, and when such conductor failed to show such orders to such engineer, and an accident happened by which the engineer was injured, *held*, that the company was liable. *Id.*

5. RAILROAD COMPANY — DUTY TO EMPLOY COMPETENT PERSONS. — When a railroad company takes a servant into its employ it becomes obligated to use proper diligence in the employment of fellow servants of ordinary fitness and competency, and not to continue an incompetent or unfit person in its service after notice. *Id.*

6. SAME — DUTY OF GIVING NOTICE. — If one servant of a railroad company becomes aware of the negligence or incompetency of a fellow servant, it is his duty to give notice to the company. *Id.*

7. SAME — DUTY OF COMPANY UPON RECEIVING NOTICE. — Upon receiving notice of the incompetency or negligence of an employee, the railroad company continues him in service at its own risk, notwithstanding the fact that it may have made inquiry or had an investigation and decided that such servant was not negligent or incompetent. It is bound by the fact, whatever it may be. *Id.*

8. SAME — REMAINING IN SERVICE AFTER NOTICE. — Where an employee knows that a fellow servant is negligent or incompetent and gives notice thereof to the company, he is not bound, at once, to leave

NEGLIGENCE — continued.

the service of the company, He may remain a reasonable time with the expectation that the company will do its duty. *Id.*

9. EXHIBITION OF NEW INVENTIONS.— New inventions in machinery are not prohibited from being shown in proper places, in proper condition and at proper times, because either men or animals may become frightened at the unusual sight. *Huntoon et al.* v. *Trumbull et al.* 314

10. SAME — PROPER CARE.— The usual place of keeping machinery of new or unusual character may be considered by the jury as bearing on the question of proper care. *Id.*

11. CAUSE OF RUNAWAY.— In an action for damages caused by a runaway horse, if the jury are satisfied from the evidence that the horse was dangerous in the sense of being disposed to run away, that fact may be considered with the other testimony in arriving at the cause of the runaway. *Id.*

12. KNOWLEDGE OF HORSE'S CHARACTER.— The knowledge of the husband (who is the driver), concerning the disposition of the horse, is the knowledge of the wife. *Id.*

13. ACCIDENT CAUSED BY VICIOUS HORSE.— If neither the husband nor wife knew the vicious character of the horse, yet if the jury are satisfied from the evidence that the horse was vicious, and that being so, caused or actually contributed to the running away and consequent injury, they must find for the defendants. *Id.*

14. NEGLIGENCE — UNNECESSARY DELAY IN TRANSPORTING FREIGHT — THAT THE COMPANY NEEDED ITS ROLLING STOCK FOR OTHER PURPOSES, NO EXCUSE FOR.— It is the duty of a railroad company, engaged as a common carrier, to transport freight without unnecessary delay. A delay of twenty-four hours at a station on the way is an unnecessary delay, unless excused. That the company needed its rolling stock for the purpose of conveying passengers is not a sufficient excuse. The duty of the company is to be prepared to execute its contracts, both to carry passengers and freight. It cannot excuse itself for failure to do the one, on the ground that it was bound to do the other, and was not able to do both. *Ormsby* v. *U. P. Railway Company*, 48

15. CONTRIBUTORY NEGLIGENCE — A FACT FOR THE JURY.— If plaintiff by his negligence materially contributed to the injury which he has sustained, he cannot recover. It is for the jury to determine whether the plaintiff, under the circumstances as shown by the proof, acted with reasonable and ordinary prudence, and whether his conduct contributed to the injury which he sustained. *Id.*

16. A COMMON CARRIER CANNOT RELIEVE HIMSELF FROM RESPONSIBILITY FOR HIS OWN NEGLIGENCE BY CONTRACT WITH THE SHIPPER.— A common carrier cannot relieve himself from responsibility for his own negligence, or the negligence of his employees, by

NEGLIGENCE — continued.

any contract that he may enter into with the shipper. A contract for shipment, in so far as it assumes to say that the railroad company shall not be liable on account of any delay in the transportation of stock, is void — and also in so far as it requires the shipper to give notice of his claim before he unloads his stock. *Id.*

17. "RULES AND REGULATIONS FOR THE TRANSPORTATION OF LIVE STOCK" CONTAINED IN PRINTED STATEMENT APPENDED TO CONTRACT DO NOT BIND THE SHIPPER.— A printed statement appended to the contract for shipment, containing a provision that in case damages occur in transporting live stock the value shall be limited to a given amount; and that blooded animals, or animals deemed especially valuable, will be carried only on special contract, and that agents are not allowed to receive and ship such animals until a proper contract is made between the owner or consignee and the general freight agent, constitutes no part of the contract, and cannot avail as a defense. The shipper is only bound by the stipulations of the contract itself. A common carrier cannot relieve itself from responsibility by mere notice appended to or indorsed upon the contract. *Id.*

18. THE AMOUNT OF DAMAGES A QUESTION FOR THE JURY — RULES IN ARRIVING AT — MEASURE OF.— As to the amount of damages, the jury are the judges. It is their duty to consider all the evidence and all the circumstances, and arrive at a just and reasonable determination. The measure of damages (in case of injury to a horse) is not what a man might have made by using him as a racer upon the track, but the reasonable market value in cash at the place where the loss occurred — the actual loss which the plaintiff sustained by reason of the injuries resulting from the negligence of the defendant. *Id.*

Per HALLETT, *District Judge.*

19. DEMURRER — PLEADING.— A demurrer "to so much of the answer as sets up the special contract" will not be received by the court. *Id.*

20. RAILROAD — CONTRACT — REASONABLENESS.— A contract between a railroad company and a shipper of horses stipulated that for injuries to the animals shipped over the line of the road the owner should make a demand in writing of the agent of the company before removing them from the place of destination or from the place of delivery. *Held*, that this clause of the contract was not applicable where the injury was the illness of the animals, and the extent of such illness could not be known until their removal from the cars, and probably not for some little time after such removal. *Id.*

21. CONTRIBUTORY NEGLIGENCE.— Certain evidence set out in the opinion *held* to show contributory negligence on the part of the plaintiff and preclude recovery for injuries received by the fall of an elevator. *Hammergren* v. *Schurmeier and others*, 518

NEW TRIAL. See *Jurors*, 1.

NON-RESIDENT. See *Taxation*, 2, 3. *Removal*, 7, 11.

NOTE. See *Administrator*, 5

1. PROMISSORY NOTE — COLLATERAL SECURITY — NOTICE OF DISHONOR. — The strict rules of law relative to the presentation and notice of the dishonor of promissory notes do not prevail when such notes are held as collateral security for a precedent debt. *Westphal and others* v. *Ludlow*, 505
2. PROMISSORY NOTE — GUARANTY OF PAYMENT — DEFENSE. — Where a promissory note is transferred and the collection of it is guaranteed by the payee in the following form, to wit: "This note is transferred and the collection of the same guaranteed to the holder thereof," the makers can make any defense to a suit commenced by an assignee that could have been made to a suit if commenced by the payee, notwithstanding the assignee may take the note before due and without knowledge of any infirmity in the note. *The Omaha National Bank* v. *Walker et al.* 565

NOTICE. See *Fraud*, 1. *Writ of Error*, 1. *Corporation*, 4. *Note*, 1. *Attorney's Lien*, 3. *Removal*, 4. *Mortgage*, 3. *Receiver*, 1. *Bonds*, 10. *Mining Claim*, 2. *Negligence*, 16, 17. *Homestead*, 12, 13. *Mechanic's Lien*, 3.

1. NOTICE — OFFICER — INDIVIDUAL. — A person will be held to have notice as an individual of what he does as president of a corporation. *Lancaster* v. *Collins*, 352
2. SAME — FRAUDULENT TRANSFER. — A., the indorser of a promissory note, was sued together with B., the maker, by E., an innocent holder for value, and judgment was recovered, part of which A. paid, and then sued B. for the amount so disbursed. B. set up as a defense in his answer that the note had been given by him, indorsed by A., to F., a corporation, in part payment for stock in F., of which A. was president; that the balance due on the stock was paid in cash and the note secured by a deposit of the stock with A.; that F. agreed with B. that he might, within one year from the date of the note, have the privilege of forfeiting the stock and cash paid, and be released from all obligation to F., and that in the mean time the note should not be negotiated; that B. had been induced by A. to make the agreement; that A., as president of F., negotiated the note contrary to the agreement; and that B. had, within the year, notified F. that he elected to forfeit the cash and stock and be released, as aforesaid. *Held*, that the answer set up a good defense. *Id.*

NUISANCE. See *Bridge*, 1. *Riparian Rights*, 2. *Injunction*, 4, 5, 6.

OBSTRUCTION. See *Bridge*, 1.

OFFICERS. See *Notice*, 1. *Reward*, 1. *Commissioners*. *Receiver*.

ORIGINAL BILL. See *Bill of Review*, 2.

OWNERSHIP. See *Mortgage*, 1, 2, 3.

PARTNERSHIP. See *Agreement*, 6, 7. *Deed of Trust*, 1.

1. PARTNERSHIP — DEBTS OF FIRM.— Where two individuals, composing a partnership, divide the stock between them and carry on separate establishments in the firm name, and either of them purchase goods on credit in the firm name, in the absence of any personal or public notice to the creditor that the firm is dissolved, either or both partners may be held liable for the debt. *The Moline Wagon Company* v. *Rummell et al.* 307
2. PUBLIC RUMOR OF DISSOLUTION.— CREDITORS who extend credit to the firm are not bound to regard public rumors of dissolution if the partners continue to use the partnership name and avail themselves of the partnership credit. *Id.*
3. MORTGAGE BY ONE PARTNER OF STOCK UNDER HIS CONTROL.— If a partnership still existed, notwithstanding the division of assets, one partner could not give a mortgage of the stock under his control to secure individual debts which he may have created. Such a mortgage would be a fraud on the partnership creditor. *Id.*
4. OBJECT OF MORTGAGE.— Whether the partnership is dissolved or not, if the object of the mortgage was to prevent, hinder or delay the firm creditors from collecting their debts, and the mortgagee knew this fact, the mortgage is void under the facts in this case. *Id.*

PASSENGERS. See *Negligence*, 14.

PATENT. See *Infringement*, 1, 4, 5. *Invention*, 1, 2. *Contract*, 1. *Bill of Review*, 8. *Administrator*, 2. *Mining Location*, 1. *Mining Claim*, 15. *Estoppel*, 3. *Trade Mark*, 1, 2.

1. PATENT — ARTESIAN WELL — PROCESS OF DRIVING AN INSTRUMENT INTO THE EARTH, ETC.— A patent upon the process of driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upwards, as it is in boring, is not infringed by constructing a well by boring a hole in the earth with an auger somewhat larger than necessary for the insertion of the pipe, and by putting said tube down said hole to the water without any driving or forcing. *Andrews et al.* v. *Long et al.* 577

PAYEE. See *Note*, 2.

PERSONAL LIABILITY OF COUNTY SUPERVISORS. See *Reward*, 2.

PERSONAL LIABILITY OF OFFICER. See *Reward*, 2.

PERSONAL PROPERTY. See *Taxation*, 1, 2, 3. *Attachment*, 1. *Mortgage*, 1, 2, 3.

PETITION. See *Removal*, 4, 5, 7, 8, 13. *Pleadings*, 1.

PLEA IN ABATEMENT. See *Practice*, 5.

PLEADING. See *Practice*, 2. *Removal*, 5, 7, 13. *Fraud*, 4. *Negligence*, 19. *Bill of Review*, 4.

1. PLEADING — INSUFFICIENT STATEMENTS IN PETITION — DEMURRER. In an action for damages for injuries to the person, by a carpenter employed by a railway company, the allegation in the petition that the injury was received while riding on a "*push-car or hand-car*" is not sufficient. Such petition is defective for uncertainty, and a demurrer to it will be sustained. *Miller* v. *The Union Pacific Railway Company*, 87
2. NECESSARY AVERMENTS.— In order to recover, the plaintiff must allege that cars such as he was riding in when injured are usually supplied with brakes, or other apparatus for controlling its movements. *Id.*
3. CONTRIBUTORY NEGLIGENCE.— It is negligence in an employee of a railway to ride down grade on a push-car, which he knew to be unsupplied with brakes; and for an injury received in such case he cannot recover. *Id.*

POSSESSION. See *Vendor*, 1, 2, 3. *Mortgage*, 2, 3. *Mining Claim*, 1, 2, 7, 9. *Attachment*, 1.

POWERS OF CONGRESS. See *Homestead Entries*, 5.

PRACTICE. See *Estoppel*, 3, 4. *Riparian Rights*, 3, 4. *Statute*, 2, 3. *Corporation*, 5, 6. *Equity*, 7. *Removal*, 11. *Mining Claim*, 12. *Contempt*, 1, 2.

1. FEDERAL PRACTICE — REMOVAL — BILL FILED IN STATE COURT — VERIFICATION — INJUNCTION.— Upon the removal of a cause from a state court an injunction will not be dissolved upon the ground that the bill filed in such court was not verified according to law and the practice of courts of chancery. *Smith and others* v. *Schwed and others*, 441
2. EQUITY PLEADING — FRAUDULENT JUDGMENT — INJUNCTION.— A bill to enjoin the execution of a fraudulent judgment need not aver that the plaintiff in such judgment is insolvent. *Id.*
3. FEDERAL PRACTICE — REMOVAL — INJUNCTION.— Upon the removal of a cause the federal court can maintain an injunction obtained in the state court. *Id.*
4. PRACTICE — JURISDICTION — MOTION TO DISMISS.— A jurisdictional question cannot be raised by a motion to dismiss, except where the want of jurisdiction appears on the face of the record. *Walker* v. *Flint and others*, 341
5. SAME — PLEA IN ABATEMENT.— Where facts not of record have to be shown, the question should be brought before the court by a plea in abatement. *Id.*

PRACTICE — continued.

6. JURISDICTION — INTERFERENCE BETWEEN STATE AND FEDERAL COURTS.— State and federal courts cannot lawfully interfere with each other where each is acting within legal limits. *Id.*

7. SAME — CUSTODY OF PROPERTY.— A federal court will neither interfere with property in the lawful custody of a state court, nor tolerate interference by a state court with property in its custody. *Id.*

8. SAME — PROPERTY NOT LAWFULLY IN CUSTODY OF STATE COURT.— An insurance company built a house partially on its own land and partially upon that of A., without A.'s consemt, and leased it to B. & C. Thereafter the company was dissolved by a decree of the state court having jurisdiction, and all its property vested in D., the state superintendent of insurance. B. & C. then attorned to D. A. and B., C. and D. were citizens of different states. After the attornment to D., A. brought suit against B., C. and D. in the federal court, to recover possession of the property of which he had been dispossessed. *Held*, that the federal court was not ousted of its jurisdiction by the attornment of B. & C. to D. *Id.*

PRE-EMPTION LAWS AND RIGHTS. See *Land Grants*, 3, 4, 5. *Homestead Entries*, 1. *Agreement*, 7.

PREJUDICE. See *Jurors*, 1, 2, 3.

PRELIMINARY EXAMINATION. See *Commissioners*, 6.

PRESIDENT'S PROCLAMATION. See *Homestead Entries*, 4.

PRINCIPAL. See *Agreement*, 4. *Accounting*, 1, 2.

PRIORITY OF LIEN. See *Judgment*, 2.

PRIVITY. See *Fraud*, 1.

PROCESS. See *Removal*, 4, 11.

PROMISSORY NOTE. See *Note*, 1, 2.

PROOF. See *Mining Claim*, 7, 9. *Negligence*, 15.

PROSPECTOR. See *Mining Claim*, 1.

PUBLIC DOMAIN. See *Homestead Entries*, 1, 3. *Mining Claim*, 1, 8.

PURCHASER. See *Statute of Limitation*, 7. *Mortgage*, 2. *Receiver*, 1, 2. *Fraud*, 5, 6, 7. *Agreement*, 1, 5, 7.

QUIT-CLAIM DEED. See *Will*, 5.

RAILROAD. See *Receiver*, 1, 2. *Pleading*, 1. *Negligence*, 14, 16, 20. *Statute*, 2. *Bonds*, 16, 17. *Verdict*, 23.

1. RAILROAD COMPANY — LEASE OF ROAD — ASSENT OF STOCKHOLDERS — STATUTE CONSTRUED.— Section 94, chapter 2, General Statutes of Nebraska, which authorizes any railroad company in that

RAILROAD — continued.

state to lease its road, provided no such lease shall be perfected until a meeting of the stockholders shall have been called, "and the holders of at least two-thirds of the stock of such company, represented at such meeting either in person, or by proxy, voting thereat, shall have assented thereto," construed as mandatory, and as avoiding a lease executed without the assent of the stockholders in meeting assembled. *Peters* v. *The Lincoln & N. W. R. R. Co. et al.* 275

2. SAME — NECESSITY FOR MEETING OF STOCKHOLDERS. — The meeting, and the vote at such meeting, of the stockholders cannot be dispensed with on the ground that the assent of the stockholders has been expressed in some other mode. The meeting, and discussion and deliberation in such meeting, are of the essence of the act required by the statute. *Id.*

3. RAILROAD COMPANY — DUTY AS COMMON CARRIER. — A railroad company, being a common carrier, is bound to receive and carry the goods of all persons alike, without injurious discrimination as to terms and rates. *Southern Express Company* v. *Memphis, etc. Railroad Company,* 570

4. SAME — SAME — DUTY TO CARRY EXPRESS MATTER. — It must receive and carry for express companies the articles known as express matter, without discrimination in favor of itself or any other express company. *Id.*

5. SAME — SAME — EQUALITY AMONG EXPRESS CARRIERS. — If the railroad company engages in the business of express carriage itself, it must do so on terms of perfect equality with all other express carriers. *Id.*

REASONABLE DILIGENCE. See *Receiver*, 5.

RECEIVER. See *Fraud*, 5. *Injunction*, 8, 9.

1. RECEIVER OF RAILROAD — PURCHASE OF PROPERTY AT FORECLOSURE SALE — LIABILITY TO SUIT IN CERTAIN CASES. — Where in a suit to foreclose a mortgage upon a railroad, a receiver appointed by the court had been discharged, and the property by order of the court turned over to the purchaser, the court reserving jurisdiction of the case for the purpose of enforcing debts and liabilities incurred by the receiver: *Held*, that suit to enforce unsatisfied claims, whether upon contract or tort against the receiver, which, if established, would constitute liens upon the property, are to be prosecuted against the property as proceedings *in rem*, upon proper notice to the purchaser, and not against the discharged receiver. *The Farmers' Loan & Trust Company* v. *The Central Railroad of Iowa,* 181

2. ESTABLISHMENT AND ENFORCEMENT OF LIEN. — It is competent for the court in such a case to establish a lien against the property in the hands of the purchaser, and to fix a time for the payment of the sum

RECEIVER — continued.
found due, and in default of such payment to order a sale of the property. The cause is to be tried with or without a jury, according to the nature of the claim as to being legal or equitable. *Id.*

3. RECEIVER OF RAILROAD — COMPENSATION.— A salary of $3,000 per annum is inadequate compensation for a receiver who is called upon to manage the repairs, preservation and operation of a long line of railroad, and who disburses in the period of twenty-seven and one-half months the large sum of $1,700,000, and gives bond in the sum of $50,000. *Farmers' Loan & Trust Company* v. *The Central Railroad of Iowa*, 318

4. SAME — SAME — AGREEMENT TO SERVE FOR A GIVEN SUM.— Nevertheless if a person agrees to serve as receiver for $3,000 per annum, and enters upon duty under an appointment fixing his salary at that sum, a court of equity will not release him from that agreement and add to his compensation unless it be shown that his duties proved to be more arduous than he or the court expected, or that he performed duties in addition to those ordinarily required of a receiver. *Id.*

5. SAME — SAME — EXTRAORDINARY SERVICES.— It is the duty of a receiver to discharge the proper duties of his office with fidelity and economy, and in such manner as to save money to the company, if by reasonable diligence this may be done, and he is not entitled to an increase of compensation for having done so. *Held*, therefore, that a receiver was not entitled to extra pay for uniting the offices of auditor and cashier, thus saving one salary; nor for the disbursement of money in payment of debts contracted by his predecessor, and the like. *Id.*

6. SAME — SAME — SAME.— A receiver may be allowed extra compensation for extra and unexpected labor performed in furnishing, upon the order of the court, reports and statements of accounts to be used in the course of a litigation; also for extra work and travel beyond office hours and at night; also for performing in person the duties of superintendent in addition to those of his office proper; also for attending personally, as an attorney, to the trial of causes in court, in so far as thereby attorneys' fees were saved to the company. *Id.*

7. SAME — FORFEITURE OF COMPENSATION BY FRAUD OR MISCONDUCT.— To deprive a receiver of all compensation on account of fraud or misconduct, it must appear that his action has been willfully corrupt. An error of judgment is not enough. *Id.*

RECORD. See *Removal*, 6. *Mining Claim*, 4.

REDEMPTION. See *Foreclosure*, 1.

REHEARING. See *Estoppel*, 4.

REIMBURSEMENT. See *Vendor*, 3.

RELEASE. See *Bonds*, 2. *Receiver*, 4.

REMEDY. See *Fraud*, 1.

REMOVAL. See *Practice*, 1, 3. *Attachment*, 3.

1. REMOVAL — JURISDICTION — TIME WHEN CAUSE CAN PROCEED.— In the case of a removal the jurisdiction of the federal court is not complete, so as to hear and determine the cause, before the day prescribed by the statute, although a transcript has been filed. *In the Matter of the Petition of the Barnesville & Moorhead Railway Company, etc.* 216
2. REMOVAL — ASSIGNMENT OF CLAIMS.— A defendant cannot acquire the right to have his cause removed to the federal courts by the purchase of the interests of his co-defendants. *Temple and others* v. *Smith and others*, 226
3. SAME — CONTROVERSY — SEVERAL CREDITORS — CONTEMPORANEOUS ATTACHMENTS.— Five several attachments were sued out on five distinct claims and were all levied at the same time upon a certain stock of goods. *Held*, that the controversy as to the ownership of the stock of goods was a single controversy between the plaintiffs on one side and all the attachment creditors upon the other side. *Id.*
4. REMOVAL — CAUSE CANNOT BE REMOVED BEFORE SERVICE OF PROCESS OR APPEARANCE.— The mere filing of a petition or bill without the issuing of process or service of notice of any kind, and where there is no appearance, does not constitute a *suit* which may be removed from a state to a federal court. *In the Matter of Receivership of Iowa and Minnesota Construction Company*, 178
5. REMOVAL OF CAUSE — CITIZENSHIP AT TIME OF COMMENCEMENT OF SUIT.— Under the act of congress of March 3, 1875, it is necessary that the petition for removal, or the record of the cause in the state court, should affirmatively show that the parties were citizens of different states at the time the suit was commenced. *Kaeiser* v. *Illinois Central Railroad Company*, 187
6. AMENDMENT OF RECORD IN CAUSE REMOVED.— After the time for removal has passed, the record of the cause can only be amended for the purpose of showing the true state of the record at the time of removal. *Id.*
7. REMOVAL OF CAUSES — CONTROVERSY — PLEADING.— It is not necessary for a non-resident to file an answer or a demurrer in the state court before petitioning for a removal of the cause to the circuit court of the United States, especially if the petition for removal be sworn to and states that there is a controversy, etc. *Bailey* v. *American Central Insurance Company*, 413
8. REMOVAL — INTERVENOR — TIME OF APPLICATION.— Where, after the suit was brought, and had been for some time pending, but before trial, T. became the owner of the property in controversy in an action of ejectment, and applied to the court for leave to intervene and be substituted in the place of the original defendant, which ap-

REMOVAL — continued.

plication was granted — *held*, that the right of the intervenor to remove this cause into the United States court, on the ground of citizenship, accrued at the time of his intervention, and a petition for removal filed simultaneously with the intervening petition was in time. *Burdick* v. *Peterson*, 135

9. REMOVAL ACTS — INTERVENOR ENTITLED TO THEIR BENEFITS.— The removal acts apply to all *bona fide* litigants in the state courts, whether made parties originally or not, and whether plaintiffs, defendants or intervenors. *Id.*

10. REMOVAL — REVIEW.— Questions passed upon in a state court cannot be reviewed upon the removal of the cause to the circuit court. *Brooks and others* v. *Farwell and others*, 220

11. PRACTICE — SERVICE OF PROCESS — NON-RESIDENT.— A party going into another state as a witness, or as a party under process of a court, to attend upon the trial of a cause, is exempt from process in such state while he is necessarily attending there in respect to such trial. *Parker* v. *Hotchkiss*, 1 Wall. Jr. 269; *The Juneau Bank* v. *McSpedan*, 5 Biss. 64. *Id.*

12. REMOVAL OF CAUSE FROM STATE COURT — CASES ARISING UNDER THE LAWS OF THE UNITED STATES.— Actions upon an adverse proceeding to prevent the issuance of patent for a mining claim are cases arising under the laws of the United States, and may be removed from the state to the United States courts for trial. *The Frank G. & S. M. Co.* v. *The Larimer M. & S. Co.* 138

13. REMOVAL — JURISDICTION — PLEADING.— Want of jurisdiction must be pleaded where an objection to the removal of a cause is made upon that ground, and such defect is not apparent upon the face of the record in the state court, or the petition for removal. *Hoyt and others* v. *Wright*, 220

14. SAME — SAME — CONVEYANCE BY PARTY TO SUIT.— A *bona fide* conveyance of the property in controversy by a party to the suit, for the express purpose of conferring jurisdiction upon the federal court, will furnish no ground for remanding a cause to a state court. *Id.*

15. REMOVAL OF CAUSE.— Application for removal of a cause from a state to a federal court on the ground of citizenship must be made before the trial of the cause. *Mooney* v. *Agnew*, 89

16. SAME — PART OF THE DEFENDANTS CANNOT REMOVE.— When judgment has been rendered against some of the defendants and an appeal has been taken to the supreme court of the state, an application on part of the other defendants for a removal will not be granted. The controversy is an entire thing, and it cannot be removed at all unless it be removed as to all. *Id.*

17. REMOVAL — LOCAL PREJUDICE ACT — FINAL HEARING IN STATE COURT.— The submission of a case to a jury does not constitute a "final hearing," within the meaning of the "local prejudice act,"

REMOVAL — continued.
when there has been a partial disagreement as to the verdict. *Osborn* v. *Osborn and others*, 455

18. CHANCERY CASE — VERDICT OF JURY — MINNESOTA STATUTE. — Under the peculiar provisions of the statute of Minnesota, the submission of the facts of a chancery case to a jury render the verdict a necessary part of the final trial of the cause. *Id.*

19. REMOVAL — ASSIGNEE — ACT OF MARCH 3, 1875, §§ 1, 2. — The first and second sections of the act of March 3, 1875, should be construed together as *in pari materia*, and therefore a removal should not be allowed in a case where the plaintiff is an assignee, unless his assignor might have brought suit in a federal court. *Berger* v. *County Commissioners of Douglass County*, 483

20. SAME — FEDERAL QUESTION — DECREE OF FEDERAL COURT. — A suit to recover taxes erroneously levied by the officials of a county, under a state statute, does not involve any federal question, although the invalidity of such taxes has been established by the decree of a federal court. *Id.*

21. REMOVAL — COUNTER-CLAIM — AMOUNT IN DISPUTE — ACT OF MARCH 3, 1875. — The claim of the plaintiff, and not the counter-claim of the defendant, should fix the amount in dispute, in determining the right to remove a cause from the state court under the act of March 3, 1875. *Falls Wire Manufacturing Company* v. *Broderick*, 489

RENEWAL. See *Usury*, 2.

REPEAL. See *Commissioners*, 10.

REPLEVIN. See *Jurisdiction*, 6.

RES ADJUDICATA. See *Decree*, 5.

RESERVATION. See *Homestead Entries*, 6, 10. *Commissioners*, 8, 9. *Land Grant*, 4, 5.

RESIDENCE, CHANGE OF. See *Taxation*, 1, 2, 3.

REVIEW. See *Removal*, 10.

REWARD.

1. REWARD FOR APPREHENSION OF CRIMINALS — OFFER BY COUNTY OFFICIALS. — An offer of a reward for the apprehension and conviction of the parties guilty of robbing a county treasury, signed by order of the board of supervisors, by the chairman thereof, is not the act of the individual members of the board for which they are individually and personally liable, but is an act done by them in their official capacity only. *Huthsing* v. *Bousquet et al.* 152

2. SAME — OFFER WITHOUT AUTHORITY UNDER MISTAKE OF LAW. — Where such an offer of reward was made by the board of supervisors, without authority, and acted upon by the plaintiffs, all parties sup-

REWARD — continued.
posing the board had such authority, the fact that they had in law no authority does not make them personally liable. *Id.*

RIPARIAN RIGHTS.

1. RIPARIAN RIGHTS — LIMITS OF STATE AUTHORITY. — The limit of the authority of states bordering on a navigable river is to protect their own shores and harbors without interfering with the opposite shores or common rights of navigation. *Rutz and others* v. *City of St. Louis*, 344
2. SAME — NUISANCE. — Where such a state authorizes a structure, which, but for such authorization, would be considered a nuisance, its own citizens must accept the legal consequences, though not without the recovery of damages; but it cannot pass a law to govern a state bordering on the opposite shore, or its citizens, or the realty situated therein. *Id.*
3. PRACTICE — DEMURRER. — The petition alleged that the plaintiff was the owner of real estate in Illinois, opposite the city of St. Louis, and bordering on the Mississippi river; that said city had caused a dyke to be built on the Missouri shore *unlawfully*, which dyke had caused plaintiff's land to be washed away. *Held*, that the defendant could not raise the question of the lawfulness of the dyke under the Missouri statutes, by demurrer to the petition, but should inform the court by answer, on trial, whether the dyke interfered with the navigability of the river, and transcended the power of the state. *Id.*
4. SAME — LOCAL ACTIONS. — *Held, further*, that the old rule as to local actions was not applicable to a suit of this nature. *Id.*
5. RIPARIAN RIGHTS. — Each riparian owner has the right, within his territory, to use the water as it flows — returning it to the channel of the river for the use of those below. *Mason et al.* v. *Cotton et al.* 82
6. REMEDY FOR VIOLATION OF RIPARIAN RIGHTS. — The remedy for the violation of the riparian rights is by action at law; and while equity may take cognizance of the violation of these rights when conceded and established, it will not aid one who, out of mere captiousness, refuses to use water after it has been diverted from the stream by another, if he may so use it with substantially the same results as if obtained by continuous flow from the stream through his own race. *Id.*

RIVER. See *Bridge*, 1.

RULE FEDERAL COURTS. See *Equity*, 2.

SALARY. See *Receiver*, 5.

SALE. See *Receiver*, 1, 2.

SENIOR LOCATION. See *Mining Claim*, 16.

SERVANTS. See *Negligence*, 1, 2, 3, 4, 5, 6, 7, 8.

SERVICE. See *Removal*, 4, 11.

SERVICES. See *Receiver*, 5.

SHERIFF. See *Attachment*, 2.

SHERIFF'S CERTIFICATE. See *Foreclosure*, 1.

SOLDIER IN ARMY OF U. S. See *Jurisdiction*, 3.

SOLICITOR — AUTHORITY OF.

1. GENERAL SOLICITORS — INSTITUTION OF SUIT — AUTHORITY. — The general solicitor of the plaintiff corporation, being an officer unknown to the articles of incorporation and the by-laws, has no authority to institute and prosecute suits without the sanction of the board of directors, and such sanction not appearing in this case, the suit was dismissed on motion. *Des Moines & Minneapolis Railroad Co.* v. *Chicago & Northwestern Railroad Co.* 531

SPECIAL CONTRACT. See *Negligence*, 19.

SPECIAL TRIBUNAL. See *Commissioners*, 2. *Jurisdiction*, 1, 2.

STATE COURT. See *Removal*, 4, 5, 7, 9, 12, 13, 15, 16.

STATUTE. See *Mining Claim*, 13.

1. STATUTE CONSTRUING STATUTE — WHEN VALID. — A statute construing and explaining a prior statute is valid, in so far, at least, as future transactions are concerned. *Stebbins* v. *The Board of County Commissioners of Pueblo County*, 196
2. STATUTE — RAILROAD — STOCK. — A statute authorizing counties to take stock in railroads is applicable to a railroad duly organized under a subsequent statute. *Id.*

STATUTE OF ARKANSAS. See *Conditional Sales*, 1, 3.

STATUTE OF COLORADO. See *Mining Claim*, 2.

STATUTE OF FRAUDS. See *Conditional Sales*, 1.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS — LETTERS OF ADMINISTRATION — MISSOURI. — The bar of the statute of limitations (Missouri) is not removed by the issuance of letters of administration upon the estate of the deceased debtor.
2. SAME — SAME — SAME. — This rule is not modified by the fact that it was not known that the decedent had any estate calling for administration until after the expiration of the statutory period of limitation. *Gaines* v. *Hammond's Adm'r*, 432
3. SAME — LITIGATION WITH THIRD PARTIES. — Such statute does not cease to run merely because the creditor is involved in litigation with third parties, upon which her individual right to the debt is dependent. *Id.*

STATUTE OF LIMITATIONS — continued.

4. SAME — SUCCESSIVE COVERTURES. — Such creditor cannot tack her subsequent disabilities by successive covertures in order to prevent the operation of the statute of limitations. *Id.*
5. UNIVERSAL LEGATEE UNDER VALID WILL — EXECUTORS UNDER VOID WILL — JUDGMENT. — *Quære*, whether a universal legatee under a valid will has any interest in a judgment obtained by the executors of a prior void will. *Id.*
6. DECEDENT'S ESTATE — ADMINISTRATION — GRANT TO REPRESENTATIVES. — *Quære*, whether a grant by the United States to the representatives of a decedent of a tract of land claimed by the decedent, and taken in execution for his debts, but to which he had in fact no legal title during his lifetime, could be treated as the individual estate of such decedent, and subjected to administration. *Id.*
7. STATUTE OF LIMITATIONS — VOID SALE — PURCHASERS. — *Quære*, whether, under the circumstances of this case, after the expiration of more than half a century, lands could be recovered from purchasers under a void sale. *Id.*
8. PRIOR KNOWLEDGE OF THE FACTS — BILL FILED IN 1848. — *Held*, that it appeared from a bill filed in the court in 1848 that the plaintiff was fully informed of all the facts which it is now averred she did not discover until a date long subsequent. *Id.*
9. STATUTE OF LIMITATIONS — COUNTY WARRANTS. — Where a county may be sued on its ordinary warrants and compelled by *mandamus* to levy a tax to pay them, the statute of limitations begins to run against such warrants from the date of their issue. *Goldman* v. *Conway County*, 327

STATUTE OF MINNESOTA. See *Foreclosure*, 1. *Removal*, 18.

STATUTE LAW AND DECISIONS. See *Fraud*, 3. *Railroad*, 1, 2. *Bankruptcy*, 2, 3. *Corporation*, 4. *Contract*, 7, 8. *Jurisdiction*, 5.

1. CONSTRUCTION OF STATUTE — MORTGAGE A DEED. — A mortgage is a deed within the meaning of the Missouri statutes (R. S. § 699), which provides that "a husband and wife may convey the real estate of the wife, and the wife may relinquish her dower in the real estate of her husband, by their joint deed." Therefore, under said provision, a married woman may mortgage her separate property when her husband joins with her. *Parsons* v. *Denis and others*, 359
2. PRACTICE — EQUITABLE DEFENSES IN ACTIONS AT LAW. — Equitable defenses are inadmissible in actions at law in United States courts. State practice does not affect the rule. *Id.*
3. SAME — SETTING UP COLLUSIVE TRANSFER. — The proper way to set up a collusive transfer, in fraud of jurisdiction, is by plea in abatement, and not by answer.

STOCK. See *Live Stock. Statute*, 2.

STOCKHOLDERS. See *Corporation*, 5, 6. *Bill of Review*, 6, 7. *Railroad*, 1, 2.

SUPERINTENDENT. See *Receiver*, 6.

SUPERVISORS OF COUNTY. See *Mandamus*, 2. *Reward*, 1, 2.

SURETY. See *Bonds*, 2.

TAXATION.

1. TAXATION — PERSONAL PROPERTY — CHANGE OF RESIDENCE. — A statute of the state of Minnesota, in force in the year 1876, imposed a tax upon "all personal property of persons residing" within the state, in reference to the quantity of such property held or owned by such residents on the first day of May of that year. *Held*, that the personal property of one who had been a resident of the state, but who was *in itinere* on the first day of May, 1876, for the purpose of making the city of New York the place of his future residence, was subject to taxation under the Minnesota statute. *McCutchen* v. *Rice County*, 337
2. SAME — NON-RESIDENT. — In the year 1877 the statute of the state of Minnesota was amended so as to impose a tax upon "all personal property employed in trade or business" within the state. *Held*, that personal property employed within the state for the purposes of private banking, and for the loaning of money on bond or note and mortgage, was employed in business within the meaning of the statute, although such business was in the process of being closed up. *Id.*
3. SAME — SAME. — In the year 1878 the statute of the state of Minnesota was amended so as to impose a tax upon "all personal property" within the state. *Held*, that the statute subjected all personal property within the state to taxation, irrespective of its ownership. *Id.*
4. TAXES ON PROPERTY IN TRANSIT THROUGH THE STATE. — A state cannot levy a tax upon property in transit to other states or countries. Such property has no *situs* in the state in the proper legal sense of that word. *Ogilvie* v. *Crawford County*, 148
5. SAME — PROPERTY IN COMMERCIAL TRANSIT. — Where a party purchased corn from various parties, caused it to be removed to the railway and there to be put in cribs temporarily to await transportation, and with the purpose on his part to have it carried beyond the state: *Held*, that it was in commercial transit, and not taxable by the state. But there must be a purpose to ship immediately, or as soon as transportation can be conveniently obtained, followed up by actual shipment in a reasonable time. *Id.*
6. SAME — CRIBBING OF CORN. — With the qualification above stated, the cribbing of corn may be treated as a thing done from necessity or for convenience in the course of transportation. *Id.*

TAX CERTIFICATE. See *Tax Sale*, 2.

TAX DEED. See *Tax Sale*, 2.

TAXES. See *Mandamus*, 3. *Vendor*, 2, 3. *Bonds*, 3, 14, 15. *Removal*, 20. *Constitutionality*, 1, 2, 3.

TAX SALE.

1. TAX SALE — AGREEMENT AMONG BIDDERS NOT TO BID AGAINST EACH OTHER.— An agreement among bidders at a tax sale, either express or tacit, that they will take turns in bidding, and not bid against each other, renders the sale and certificate thereof void. *Singer Manufacturing Company* v. *Israel Yarger*, 583
2. TAX CERTIFICATE — RIGHTS OF ASSIGNEE.— It is settled as the law of Iowa that the assignee of a tax certificate holds it subject to all the infirmities by which it would have been affected in the hands of the tax purchaser. *Id.*
3. TAX DEED — BY WHOM ATTACKED FOR FRAUD.— While section 897 of the code of Iowa (1873) gives to the owner of the land a remedy for fraud in the tax sale of the same, it does not deny to others a like remedy. A remedy for fraud is allowed to the party injured by the general principles of equity jurisprudence which prevail in the federal courts. A mortgagee of the land may have such remedy. *Id.*

TENANTS IN COMMON. See *Agreement*, 1, 5, 7.

TESTATOR. See *Will*, 1.

TITLE. See *Mining Claim*, 8, 11, 12. *Commissioners*, 3. *Homestead Entries*, 1, 11. *Equity*, 7. *Contract of Agreement*, 3, 5. *Deed of Trust*, 2.

1. TITLE BY LIMITATION — ADVERSE POSSESSION.— If a possession of real estate is held by mere indulgence, or by consent of the owner, and the person in possession understands this, the possession is not adverse and cannot ripen into a title which will defeat the right of the legal owner. *Larwell* v. *Stevens*, 311
2. SAME — EXCLUSIVE POSSESSION.— If at any time within ten years the legal owner and the claimant by possession have had joint possession of the premises, such a possession cannot establish a limitation against the title of the real owner. *Id.*
3. SAME — INTENT TO ACQUIRE ADVERSE POSSESSION.— The intention to acquire title by adverse possession must be entertained at the time the ten years' limitation commences to run. *Id.*

TORT. See *Administrator*, 1, 2. *Receiver*, 1.

TOP OR APEX. See *Mining Location*, 1. *Vein*, 3. *Mining Claim*, 16.

TRADE-MARK.

1. TRADE-MARK — PATENTED ARTICLE — SPECIFIC DESIGNATION. — Where a word indicates a patented machine of peculiar mechanism, such word cannot be protected as a trade-mark upon the expiration of the patent. *Singer Manufacturing Company* v. *Stanage*, 512

TRADE-MARK — continued.

2. SAME — "SINGER" MACHINE. — Certain patented sewing machines were known as the "Singer" machines. *Held*, that the word "Singer" was not a trade-mark, and became common property upon the expiration of the patent. *Id.*

TRANSFERS. See *Statute*, 3. *Notice*, 2. *Note*, 2.

TRANSPORTATION. See *Negligence*, 14.

TREATY. See *Homestead Entries*, 2, 3.

TREATY WITH INDIANS. See *Commissioners*, 7, 8.

TRIBUNAL. See *Commissioners*, 2, 4.

TRUST. See *Will*, 5.

TRUSTEE. See *Vendor*, 3. *Agreement*, 1, 4.

ULTRA VIRES. See *Reward*, 2.

1. ULTRA VIRES — CONTRACT OF INSURANCE. — An insurance company is not estopped from setting up the fact that a contract of insurance made through its agent is *ultra vires*, though its agent had led the other contracting party to believe, and he did believe, that the company had power to make it, and though no pretense was set up by the company or its agent that the contract was *ultra vires* until a loss thereunder was known by all parties to have occurred. *Webster and others* v. *Buffalo Insurance Company*, 348

UNCERTAINTY. See *Pleadings*, 1.

UNITED STATES MARSHAL. See *Attachment*, 2.

UNNECESSARY DELAY. See *Negligence*, 14.

USAGE. See *Custom*, 2.

USURY. See *Contract*, 6, 7, 8. *Insurance*, 7.

1. USURY — AGENCY. — If an agent, in good faith, makes a loan for another and without the knowledge or authority of his principal, and for the agent's own benefit exacts more than legal interest, the loan is not thereby rendered usurious. *Palmer* v. *Call*, 522

2. SAME — RENEWAL — BONA FIDE ASSIGNEE. — Where an usurious obligation is passed for value to an innocent purchaser without notice of the usury, who afterwards takes a new and substitute security for the debt, there being no taint of usury in the second transaction, the plea of usury to the substituted obligation cannot be sustained. *Id.*

3. CASE STATED. — A. placed $10,000 in B.'s hands to loan. B. made the loan to the defendant, giving him $8,000, retaining $2,000 as commission, and receiving in his own name defendant's note for $10,000, with semi-annual interest notes of $500 each. B. retained custody of the notes, but recognized them as the property of A., who

USURY — continued.

received the interest, but knew nothing of the usury, and gave B. no authority to retain any bonus out of the sum loaned, or take more than legal interest therefor. The plaintiff purchased the notes in good faith at their face value without knowledge of the usury in the original loan, and afterwards, through B. & Co., made a new contract with the defendant by which he advanced him $1,000, surrendered the note and received from him the note now in suit for $11,000. Plaintiff did not know that B. & Co. retained $500 of the $1,000 he advanced as commission for procuring the reloan. The defense of usury being set up in suit to foreclose the mortgage given to secure the note, *held* —

(1) That as neither A. nor the plaintiff had any knowledge of the usury, and derived no benefit from it, the plea of usury must be overruled.

(2) That A. was to be regarded as the lender of the money, although B. failed to disclose his principal and took the notes in his own name.

(3) That plaintiff could still recover, though B. be regarded as the lender, since the substitution of the new security purged the loan of the taint of usury in his hands as an innocent assignee.

(4) That the statutes of Iowa relative to usury have not modified the foregoing rules of law. *Id.*

UTE RESERVATION. See *Commissioners*, 9.

VEIN. See *Mining Location*, 1, 2. *Mining Claim*, 13.

1. VEIN OR LODE.— The law goes upon the hypothesis that all veins are more or less vertical in the earth; and the statute of the United States requires that the locations of mining claims shall be upon the top or apex of the vein. *Iron Mine* v. *Loella Mine*, 121

2. RIGHT TO PURSUE THE VEIN.— Having discovered a vein, and located the claim so that the top or apex thereof is within his surface lines extended down vertically, the locator is, by the law, permitted to follow it *to any depth*, although in its downward course the lode or vein may enter the adjoining land, as far as he can show that it is the same lode or vein. It does not matter that the decline be only a small degree from the plane of the horizon. *Id.*

3. TOP OR APEX — MEANING OF.— The top or apex is the end or edge or terminal point of the lode nearest the surface of the earth, without regard to the depth from the surface at which it may be found. If found at any depth, and the locator can define on the surface the area which will inclose it, the lode may be held by such location. *Id.*

4. IF THE LODE IS CONTINUOUS FROM SIDE TO SIDE of the claim — "that is to say, if coming in at one side it passes unbroken to the other" — the locator cannot follow it beyond his surface lines. No location can be made on the middle part of a lode, or otherwise than at the top or apex, which will entitle the locator to go beyond his lines. *Id.*

VEIN — continued.

5. QUERY.— Whether a location made on the dip of a vein would not be valid as against one of later date made higher up? Whether if location be made upon the dip of a vein, the locator may not pursue it in the downward course — although he may not in the upward course — and may not hold the whole which lies within his location below it, as against any person locating subsequently, at a higher point on the same vein? *Id.*

VEIN IN PLACE. See *Mining Location*, 1, 3.

VENDEE. See *Fraud*, 2. *Conditional Sale*, 2. *Vendor*, 1, 2, 3. *Agreement*, 1. *Attachment*, 4.

VENDOR. See *Conditional Sale*, 2. *Fraud*, 1, 2. *Mortgage*, 1, 2, 3. *Attachment*, 4.

1. VENDOR AND VENDEE — VENDEE'S RIGHT TO POSSESSION OF LAND.— Where land is vacant, and a contract for its transfer is silent as to possession, and the vendee has fully performed on his part, and it only remains for the vendor to make the necessary conveyance, his rights are fixed, and there is an implied agreement or license that the vendee may at once take possession and have the use of the land. *Sherman, Assignee, etc.* v. *Savery and others*, 107

2. SAME — LIABILITY OF VENDEE FOR TAXES.— A vendee in such case should pay his proportion of taxes thereafter assessed upon such land, and it is no defense against such obligation that the vendor refused to convey to him, but conveyed to another against whom a decree for specific performance has since been entered. *Id.*

3. SAME — SAME — VOLUNTARY PAYMENT OF TAXES BY TRUSTEE.— Where lands which a vendee was entitled to have conveyed to him were transferred by the vendor to another, who was subsequently held to be trustee for such vendee, and decreed to convey to him, *held*, that taxes paid by such trustee to protect the title subsequently conveyed to vendee was not a voluntary payment, and he was entitled to reimbursement therefor, although the decree of the state court, under which such conveyance was made, ordered a conveyance "free from incumbrances executed or suffered." *Id.*

VERDICT. See *Removal*, 18.

1. DIRECTING A VERDICT.— It is now settled in the federal courts that if, upon the evidence, the court would set aside a verdict against the party, if rendered, it is its duty to charge the jury not to return such a verdict. Upon a motion to direct a verdict for the defendant the question is, whether if a verdict were rendered for plaintiff upon his evidence, the court would set it aside as being contrary to the evidence. *Schofield* v. *The Chicago, Milwaukee & St. Paul Railroad Company*, 268

VERDICT — continued.

2. Crossing Railway Track — Duty of Looking Out — Contributory Negligence.— As there is great danger in crossing a railroad track where trains are liable to pass at any time, great care is demanded alike of the engineer in charge of the locomotive and of the traveler upon the highway. Their rights, duties and obligations are mutual and reciprocal. Both must look out for danger. *Id.*

3. Same — Same — Same.— *Held*, accordingly, that where the plaintiff was familiar with the crossing, and where he had a fair view of the railroad from the depot to the crossing, about seventy rods, and could have seen the track for that distance any time after approaching within six hundred feet of the crossing, it was contributory negligence for him to drive upon the track without looking for an approaching train, and he could not recover even if the engineer was also guilty of negligence in running the train at a great and dangerous speed, and in failing to give warning of his approach by sounding the whistle or ringing the bell. *Id.*

VERIFICATION. See *Practice*, 1. *Removal*, 7.

WAIVER. See *Insurance*, 11.

WARRANTS. See *Statute of Limitation*, 9. *County Warrants.*

WIFE. See *Negligence*, 12.

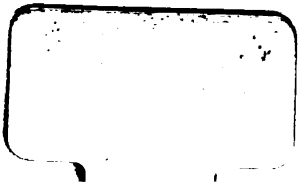
WILLS. See *Statute of Limitation*, 5, 6.

1. Will — Construction — Power of Disposal Coupled with Devise of Conditional Interest.— Jacob Dawson disposed of all his property by will, as follows: "After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to be and remain hers with full power, right and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow; upon the express condition, however, that if she should marry again, then it is my will that all the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike; and in case any of my children should have deceased, leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute and appoint my said wife, Edith J., to be executrix of this my last will and testament, hereby revoking all former wills made by me." *Held* that, construing all the clauses of the will together, it conferred upon the devisee power to convey the fee of the premises at any time during her widowhood. *Giles* v. *Little*, 370

WILLS — continued.

2. WILL — POWER OF SALE — CONSTRUCTION. — A will which authorizes the executors to sell real estate and pay certain legacies out of the proceeds, does not vest title in such executors — especially where by the same instrument the testator bequeaths the "rest and residue" of said real estate to his heirs. The entire instrument is to be construed together and so as to harmonize all parts, if possible. *Beadle* v. *Beadle*, 586
3. SAME — SAME — SAME. — A devise of land to the executors to sell passes the title; but a devise that the executors may sell, or shall sell lands, or that they may or shall be sold by the executors, gives them only a naked power of sale. *Id.*
4. CONVERSION OF REALTY INTO PERSONALTY — ELECTION. — Where executors are by the will distinctly directed to sell real estate and convert it into personalty and pay proceeds to certain persons, equity will consider the conversion as made and will treat the real estate as personalty; but where the same persons receive the bequest, whether it remain in the form of realty or be sold and converted into money, those persons may elect to take either. No other person can have any interest in the question. *Id.*
5. ASSIGNMENT — QUIT-CLAIM DEED — TRUST. — An assignment by one devisee under a will of all his interest in the estate to another devisee, which was made to defraud creditors, is void, and no relief can be granted under it to either of the parties. A quit-claim deed made by one joint owner to his co-tenant, though absolute upon its face, will, if intended as a mere matter of convenience in making conveyances to purchasers of portions of the land, be treated as between the parties as a conveyance in trust only, and not as divesting the grantor of his interest in the land. Evidence to establish a trust in this case considered. *Id.*
6. EVIDENCE — CONTEMPORANEOUS ACTS — DECLARATIONS AND WRITING. — Where the testimony of the parties in interest is directly in conflict as to the purpose and intent with which a certain quit-claim deed was executed, the conflict may be determined by a consideration of the corroborating testimony, and particularly by the acts, declarations and writings of the parties contemporaneous with the transaction in question. *Id.*

WRIT OF ERROR.

1. WRIT OF ERROR TO DISTRICT COURT — WHEN TO BE ALLOWED. — Under section 4981, Revised Statutes of the United States, a cause cannot be removed from the district to the circuit court unless the writ is claimed and notice given within ten days, as in cases of appeal. *Wear* v. *Mayer*, 172
2. TRIAL OF ISSUE OF FACT BY THE COURT — EXCEPTIONS. — It is well settled that in the absence of a statute authorizing that mode of

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